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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1968

No. [redacted]57

CHARLES COHON, IRVING SIRBU, JACK DORIAN, WALTER MATOFF, CATHERINE CARELLA, MICHAEL CARELLA and PASQUALE MANISCALCO,

Appellants,

vs.

JAMES O. REIMEL, Director of the Department of Alcoholic Beverage Control of the State of California,

Respondent.

Appeal from the Judgment of the Court of Appeal of the State of California, First Appellate District, Division One, and Numbered Therein Nos. 22,905, 22,906, 22,994, 22,995, 23,282

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

PRIOR PROCEEDINGS

This is an appeal by seven individuals, all retail liquor licensees, whose actions were consolidated for

appeal in the Court of Appeal of the State of California and who appeal herein from the decision of the California Court of Appeal rendered November 21, 1967 (reported in 64 Cal. Rptr. 26, 256 Advance Cal. App. 188), in which a rehearing was denied on December 15, 1967 and a hearing of the Supreme Court of California was denied on January 17, 1968. The aforesaid decision of the Court of Appeal (which is appended hereto as Appendix A), reversed the order of Joseph Karesh, Judge of the Superior Court, State of California In and For the City and County of San Francisco, denying a writ of mandate directed to the Alcoholic Beverage Appeals Board, State of California, which held in favor of each of the Appellants herein in five unreported judgments which are attached hereto as Appendix B.

GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

Appellants Cohon, Sirbu, Michael Carella, Catherine Carella and Pasquale Maniscalco had their licenses revoked by the Department of Alcoholic Beverage Control, State of California and Appellants Dorian and Matoff had their licenses suspended for violation of the California Mandatory Retail Price Fixing Law under which the retail prices of alcoholic beverages are set in the State of California. The licensees received these penalties for selling below the mandatory retail prices filed by the liquor distillers with the State of California in Sacramento.

The decision of the Department was reversed on State grounds (not on the Federal grounds which also were raised) by the Department of Alcoholic Beverage Control Appeals Board, State of California. The Department applied for a writ of mandate to the Superior Court to reverse the Appeals Board. The writ was denied by the Superior Court of the State of California, City and County of San Francisco and on appeal, the California Court of Appeal reversed the Superior Court and Appeals Board so that the suspension and revocations were to go into effect. The judgment of the Court of Appeal of the State of California from which review is sought, was rendered November 21, 1967. A rehearing was denied on December 15, 1967 and a hearing was denied by the Supreme Court of the State of California on January 17, 1968. A Notice of Appeal to the United States Supreme Court was filed on April 8, 1968 in the Court of Appeal of the State of California.

This is an appeal pursuant to 28 U.S.C.A. 1257 (2). Among the cases sustaining jurisdiction are *Seagram & Sons v. Hostetter,* 384 U.S. 35, 16 L. Ed. 2d 336, 86 Sup. Ct. 1264; *Standard Oil Company of California v. Johnson,* 316 U.S. 481, 86 L. Ed. 1611, 62 Sup. Ct. 1168.

Appellants have at all stages of the proceedings alleged that the Mandatory Retail Price Fixing Law for the pricing of alcoholic beverages in the State of California violates the Fifth and Fourteenth Amendments to the United States Constitution and also violates the Sherman Anti-trust Act, 15 U.S.C.A. §§ 1 and 2, even as amended by the Miller Act, 15 U.S.C.A. § 1 and the

McGuire Act, 15 U.S.C.A. § 45. The California laws which appellants claim to be in violation of United States Constitution and the Federal Anti-trust Act, are California Business and Professions Code, § 24755, a copy of which is attached hereto as Appendix C and the section of the California Administrative Code dealing with price fixing, Title 4, California Administrative Code § 99, attached hereto as Appendix D.

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by the appeal herein are as follows:

1. Whether or not the California Mandatory Liquor Price Fixing Laws are invalid as being violative of the Anti-trust laws of the United States (15 U.S.C.A. §§ 1, 2 and 45). § 24755 of the Business and Professions Code of the State of California and Title 4, California Administrative Code § 99, the administrative regulations which carry out the liquor price fixing laws of California, provide for price fixing methods which are a per se violation of the Sherman Act and do not come within the exemptions of the Miller-Tydings or McGuire acts. Prior to 1961, the California statutes required that branded alcoholic beverages in fair and open competition could be fair traded in California upon a price established by a contract or agreement. The amendment in 1961 of § 24755 (in response to a finding by the Superior Court, State of California, In and For the City and County of San Francisco, that a revocation was improper because there had been no finding that the items were in fair and open competi-

tion as required by the statute and the amendments to the Sherman Act, 15 U.S.C.A. § 1 and § 45) eliminated the necessity of a contract or agreement and eliminated the requirement that the commodity be in fair and open competition. Attempts to show the absence of fair and open competition were almost always refused when it was a requirement of the statute and now that it is not even made a requirement, there can be and need be no showing made of the presence or absence of this competition.

Minimum price fixing by agreement or compulsion is illegal per se under the Federal Anti-trust Legislation unless the Federal exemption statutes apply. This is true even in the case of Liquor. See *Schwegmann Brothers v. Calvert Distillers Corp.,* 341 U.S. 384, 386-388 (1950). The California statute does not come under any exemption.

2. It is next contended that § 24755 of the Business and Professions Code and Title 4, § 99 of the Administrative Code are violative of the Fifth and Fourteenth Amendments to the United States Constitution and more particularly, of the Due Process clause of the Fifth Amendment and the Equal Protection clause of the Fourteenth Amendment to the Constitution. This statute sets up privileges for the oligopolists who run the liquor industry that are not available to any other industry. There is no valid reason for this distinction or for the fact that the statute sets up two different trading areas within the State of California. There is no legitimate purpose for this discriminatory statute nor is it a reasonable restriction.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

The facts of the consolidated cases below are as follows:

Petitioners' licenses to sell alcoholic beverages in the State of California were suspended or revoked for failure to comply with Section 24755 of the Business and Professions Code of the State of California. This section is the "mandatory price-fixing of liquor statute" and provides that it is a violation of the law for retailers to sell branded distilled spirits at prices below the price filed by the manufacturer or owner of the brand. The Petitioners herein are holders of off-sale general liquor licenses issued by the Department of Alcoholic Beverage Control of the State of California against whom the Department filed accusations alleging the sale of branded distilled spirits at prices lower than the stipulated minimum retail schedules filed with the Department. After hearing by the Department, Petitioners Gohon and Sirbu and Carella and Maniscalco had their licenses revoked while Darian and Matoff had their licenses suspended. On appeal to the Alcoholic Beverage Control Appeals Board, the Department was reversed on the basis that the evidence did not support the Department's finding that the licensees sold at prices "below the minimum retail price schedule duly filed." This ruling was upheld by the Superior Court but was reversed on appeal by the California Court of Appeal, and hearing was denied by the California Supreme Court.

The aforesaid questions concerning the United States Constitution and Federal Anti-trust laws have

been consistently raised in each stage of the proceedings in all of the consolidated actions. In the lower stages, all of the Appellants were represented by the same counsel (who died before the cases reached the Court of Appeal) and in his first pleading entitled "Notice of Defense" in each of the actions, (e.g., In the Matter of the Accusation against Michael Carella and Pasquale Maniscalco, Reg. 2423) he raised, on page 2, the argument that § 24752 - § 24755 inclusive, of the Business and Professions Code and Rule 99 of Title 4 of the California Administrative Code, violated § 1 and § 2 of the Sherman Anti-trust Act. On page 4, said Sections were alleged also to violate the Fifth and Fourteenth Amendments to the Constitution of the United States.

In the Notice of Appeal from the original hearing by the Department of Alcoholic Beverage Control, on pages 2 and 4, again the United States Constitutional and Anti-trust arguments were raised.

Before the Alcoholic Beverage Control Appeals Board which reversed the decision of the Department (See page 1 of the decision under Reg. 2423 In the Matter of Carella and Maniscalco attached hereto as part of Appendix B), the Appeals Board stated that the questions of the constitutionality of the statute and the applicability of the Anti-trust laws were raised, but the Board in its opinion only dealt with whether the price schedules were published in accordance with the requirements of the statute.

In the Reporter's Transcript in the various cases there is testimony to show the lack of fair and open

competition in violation of the Anti-trust laws and also to show by such testimony the unreasonableness of the statute. See: e.g. Carella and Maniscalco, Reg. 2423 Reporter's Transcript, pages 24 to 26, where in the testimony of Charles Hammer, Division Sales Manager of Fleischman Distilling, it was brought out that the wholesalers and distillers confer as to what price should be filed. The price so arrived at is then the mandatory price at which retailer must sell the item and that the consumer must pay to the retailer. It is pointed out therein that this consultation is done with wholesalers who have exclusive representation of brands of various distillers. It is further pointed out that there is no State control whatsoever over the price that is filed and that the statute provides for no such State supervision, but only states that the price which distillers desire to file is the one at which the item must be sold.

Further evidence of this law as being purely for the liquor distillers and wholesalers and not for the public has been attempted to be brought out in other cases challenging the State liquor pricing laws before the California courts. In the Supplemental Brief in the California Supreme Court in *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* 65 Cal.2d 349, 420 P.2d 735 (discussed infra) there was an attempt to introduce into evidence the speech of Malcolm E. Harris, at that time Director of the California Department of Alcoholic Beverage Control. In this speech, which was refused in evidence, Mr. Harris noted numerous practices existing in the liquor indus-

try which pointed out lack of free and open competition. In his speech before the liquor wholesalers and distillers, Mr. Harris said that:

> "At various times in the past nearly everyone in this room, either individually or through your trade associations, has complained to me that Fair Trade violations damage your business. The sections I have quoted give you the opportunity to collect for the damages you have alleged. Even though you may prove only one cent of damages, at least you will put the offending retailers on notice that you mean business with your Fair Trade contracts. Of course, if no suits for damages are filed after the Department has furnished evidence of violations, two logical conclusions could be drawn: First, *no one has been damaged* (emphasis added), and second, if no one has been damaged by Fair Trade violations, the state should not use its police power to enforce fair trade."

It is a clear statement by the Director that the purpose of fair trade is to benefit the distillers and not the public. He is stating that if the distillers and wholesalers are not damaged enough so as to want to institute actions themselves, then no one is damaged and the State should not enforce the provisions. Mr. Harris is now Vice President of the Distilled Spirits Institute, Inc., an organization of distillers.

The Unconstitutionality of the State statute was also raised in the State Court of Appeal wherein, e.g., the violation of the Anti-trust laws was pointed out at page 74 of the Reply Brief of respondents, Carella and Maniscalco. The Court of Appeal, at page 15, in ruling on whether or not the provisions of § 24755 are "so

arbitrary as to amount to a denial of due process of law as guaranteed by Federal and State Constitutions" held that the matter was disposed of by the California Supreme Court in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control,* 65 Cal.2d 349. It further held that the removal of fair and open competition from the statute did not make it violative of the laws of the United States.

A SUBSTANTIAL FEDERAL QUESTION IS INVOLVED IN THE PROPOSED APPEAL

Petitioners allege that Section 24755 of the California Business and Professions Code violates the Constitution of the United States in that it is violative of the Due Process Clause of the Fifth Amendment and of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and further that it is in conflict with Sections 1 and 2 of the Sherman Anti-trust Act (15 U.S.C.A. 1 and 2). This State statute has been before the California Supreme Court twice in the last eight years, *Allied Properties v. Department of Alcoholic Beverage Control,* 53 C.2d 141, 346 P.2d 737, and *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* 65 C.2d 349, 420 P.2d 735.

The statute, as stated, is California's mandatory price fixing statute which provides for manufacturers to publish the price at which their brands are to be sold and the retail licensees are subjected to fines or suspension and/or revocation of license for sale below the filed price. In the *Allied Properties* case, *supra,*

Superior Court Judge Albert Wollenberg (presently a United States District Court Judge for the Northern District of California, Southern Division) found the statute Unconstitutional. On appeal, by a two to one decision of the California Court of Appeal, he was reversed and the statute was found Constitutional. In 1959, by a four to three decision of the Supreme Court of the State of California, the Court of Appeal was affirmed and the statute was found Constitutional. Neither an appeal nor a petition for certiorari were taken to the United States Supreme Court in that case.

In the case of *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* the California Supreme Court, by a five to two decision in 1966, again declared the statute Constitutional. After the California Courts' decision was final, application was made to a three Judge District Court which decided *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* 266 F. Supp. 168 and held, at page 170 that:

> "A judgment upon the merits of the State Court action is res judicata in a subsequent Federal Court action where the parties in the subject matter are the same. This is true not only with regard to matters actually presented to sustain or defeat the right asserted but also as respects any other available matters which might have been presented to that end . . . Plaintiff's remedy, after the final judgment of the State Courts, is that of appeal or petition for certiorari to the United States Supreme Court."

In that action, it was not economically possible for the single licensee, after so many years of struggle, to

go further on appeal to the United States Supreme Court. This is therefore the first time that application has been made to the United States Supreme Court for a ruling on the Constitutionality of California's liquor price fixing statute.

In addition to the split which exists among the California Judges themselves as to the Constitutionality of the statute (in the original case involving liquor price fixing, *Allied Properties,* six Judges held the statute Constitutional and five held it Unconstitutional), there is a sharp division of authority among the highest courts of other states as to the Constitutionality of similar price fixing statutes. Almost every one of the other State courts which has been confronted with similar liquor price fixing statutes has held them Unconstitutional. In *Reynolds v. Louisiana Board of Alcoholic Beverage Control,* La. 1966, 185 So. 2d 794, the Louisiana Supreme Court held its mandatory price fixing statute (similar to that of California) Unconstitutional as violative of the Due Process Clause of the Federal Constitution. The court states at page 812 that the statute

> "bears no real or substantial relation to the general health, morals or welfare of the people. At best, it represents an ignoble flight from competition."

A petition for certiorari was filed in the United States Supreme Court and was denied on November 14, 1966, US Law Week 3173.

In addition, the California decision is in conflict with the decision of the Supreme Court of New Mexico in

Drink, Inc. v. Babcock, 421 P.2d 798, in which the court stated at page 803:

> "We hold that the fair trade contract and mark-up processes of the liquor control act are manifestly unreasonable legislation and are not an appropriate exercise of the States' police power . . ."

Such acts have also been held Unconstitutional by the Florida Supreme Court in *Scarborough v. Webb's Cut-rate Drug Company,* (1942) 150 Fla. 754, 8 So.2d 913, where the court states at page 922:

> "The act, upon its face, is one not designed to affect the public health, safety or welfare, but is designed solely for the protection of the wholesale liquor dealer by allowing him to control the retail prices so that his consumers may be forced to sell liquor at a substantial profit . . ."

The court further stated at page 921:

> "There is not one thing in the act to indicate that there were any legislative findings that any necessity existed for the terms of the act nor is there any power or authority vested in any board to make any findings of fact in regard thereto. No hearing is provided for, no Due Process is contemplated, all of which are certainly necessary to make a price fixing act valid."

Similar price fixing statutes were held Unconstitutional by Oklahoma in *Oliver v. Oklahoma Alcoholic Beverage Control Board,* 359 P.2d 183 (1961); in Kansas in *State v. Mermes,* 358 P.2d 936 (1961); in Illinois in *Lombardo Wine Co. v. Taylor,* 95 N.E. 2d 60 and in Nebraska in *Terry Carpenter v. Nebraska Liquor Control Commission,* 120 N.W. 2d 374.

The California price fixing statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because it sets up a rule for liquor retailers that does not exist for any other retailers and because, with no basis for the distinction, two different trading areas are set up within the State and the manufacturer can file one price for Northern California and another price for Southern California.

In the *Wilke & Holzheiser* (supra) and the *Allied Properties* (supra) cases, as well as herein, the California Attorney General representing the Department of Alcoholic Beverage Control, has argued that the Twenty-First Amendment to the United States Constitution prevents any challenge of the California statute based on the United States Constitution.

In the Memorandum in Opposition to the Application for Stay Pending Appeal in the Supreme Court herein, the Attorney General for the State of California cites *State Board of Equalization v. Young's Market,* 299 U.S. 59, 63-64, (1936) stating:

> "A classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth."

In the same Memorandum, the Attorney General for the State of California makes a great point of *Schwartz v. Kelly,* 140 Conn. 176, 99 Atl. 2d 89 (1953), in which a hearing was denied by the United States Supreme Court. This case was prior to the recent line of cases in which the Court has asserted the interdependence of the Twenty-First Amendment on the other provisions

of the Constitution. Also, the Connecticut statute is somewhat different from California's in that in Conn. Gen. Stats., Vol. 6, paragraphs 30-64 and 30-65, price schedules remain in effect only for the period fixed by the Commission, are uniform throughout the State and the Commission has power to vary the minimum consumer price as the Commission deems necessary. Also, the Connecticut statute is now considerably different from California's in that § 30-68A has been added so that there are minimum markups on the price of liquor, making the pricing not wholly within the discretion of the distillers as it is in California.

The position that the Twenty-First Amendment gives the liquor industry some "privileged status" has recently been substantially altered by the United States Supreme Court. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 12 L.ed.2d 350, 84 Sup. Ct. 1293, the Court states at 12 L.ed.2d at page 356, that

> "To draw a conclusion from this line of decisions that the Twenty-First Amendment has somehow operated to repeal the commerce clause wherever regulation of intoxicating liquors are concerned, would be an absurd oversimplification."

Also the Supreme Court in 1966 held, in *Joseph E. Seagram v. Hostetter;* 86 Sup. Ct. 1254, that the Twenty-First Amendment must be read in light of the other Amendments of the Constitution and although the court upheld the New York law being questioned there, it clearly established the principle that the State law had to be a reasonable law and not deny the requirements of equal protection of the laws as provided

by the Fourteenth Amendment. The Court, at 86 Sup. Ct. 1261, in analyzing whether or not the New York law violated the Anti-trust Act, stated:

> "Nothing in the Twenty-First Amendment of course would prevent enforcement of the Sherman Act against such a conspiracy."

See also: *Idlewild Bon Voyage Liquor Corp. v. Epstein,* (1962) 370 U.S. 713, 8 L.Ed.2d 794, wherein the court held that there was a substantial Constitutional question raised. Here an action of the New York State Liquor Authority was being challenged.

As recently as this term, in *Burke v. Ford,* 19 L.Ed. 2d 554, (1967), the Supreme Court held Per Curiam that the District Court had jurisdiction to hear a case based on § 1 of the Sherman Act against all Oklahoma liquor wholesalers who allegedly were engaged in a statewide market division. Here, liquor was involved completely within the state's borders and Federal law was still held to apply.

The California liquor price fixing statute has been described by a California Appellate Court Judge, in his dissenting opinion in *Allied Properties v. Department of Alcoholic Beverage Control Board,* 339 P.2d at page 1024, as follows:

> "Thus, the very person or corporation that manufactures or distributes the product sets the price at which the retailer may and must sell, without any right of any kind or character on the part of any representative of the State, to challenge it for price, quality or otherwise. This, to me, is uncontrolled monopoly run riot with State sanction."

§ 24755 of the California Business and Professions Code, which sets up the price fixing statute, is a statute which is clearly written by and for the liquor distillers and on its face presently violates Federal Anti-trust laws. Whenever a judicial obstacle is created, the statute is changed. When the California Superior Court, For the City and County of San Francisco reversed a license revocation because there had been no finding that the liquor sold had been in free and open competition, the statute was changed so that free and open competition is no longer a requirement. The elimination of this requirement, as well as the discretion of liquor distillers, is clearly not in accord with the Anti-trust immunity provided for by the Miller-Tydings and the McGuire Acts and minimum price fixing by agreement or compulsion is illegal per se under the Federal Anti-trust laws unless the Federal exemption statutes apply. (See *United States v. McKesson & Robbins,* 341 U.S. 305, 309-311 (1953) and *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 386-388 (1950).

Since the California statute does not provide for either free and open competition or contracts, it is not immunized from Federal Anti-trust laws. *Eastman Kodak v. Federal Trade Commission,* 2d Cir. 330 U.S. 828, clearly held that the Miller-Tydings amendment only validates retail price agreements with respect to pricing of commodities which are in effective competition with similar commodities produced by others.

California has not permitted the licensee before the California Administrative Agencies or Courts to pre-

sent evidence of lack of free and open competition before the State Hearing Board. See: *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal.App. 2d 787 and *Dave's Market v. Department of Alcoholic Beverage Control,* 222 Cal.App.2d 671.

Analogizing the mandatory price-fixing characteristics of the statute herein to those of the normal fair trade statutes, is clearly misleading. As Justice Peters of the California Supreme Court states in his dissent in *Wilke & Holzheiser v. Alcoholic Beverage Control,* 65 Advance Cal. Rptr., 385 at p. 417:

> "This, the fair trade provisions of the Alcoholic Beverage Control Act, together with the disciplinary power given the Department of Alcoholic Beverage Control directly by the Constitution, comprise a mandatory price-fixing system whereby the producers or wholesalers of branded or trademarked alcoholic beverages fix the retail prices of those beverages, and adherence to the prices is guaranteed by threat of imposition by the state of civil and criminal sanctions upon non-complying retailers."

Then Justice Peters goes on to say, at page 418:

> "The liquor fair trade law is to be distinguished from the general Fair Trade Act applicable to all branded or trademarked commodities sold at retail which are in free and open competition with others of the same general class. . . . The general act is permissive rather than mandatory. . . . It is enforced only by private suits not by criminal penalties or revocation or suspension of licenses by an administrative body."

If this Court will hear this appeal, appellants can bring before this Court facts concerning the structure of the liquor industry which show that there is no real competition between the big four distillers who control 90% of the liquor business in the United States. As former State Assemblyman Caspar Weinberger, presently Finance Director of the State of California, stated in an article in the San Mateo Times on April 28, 1964:

> "No one has satisfactorily explained why the State should allow liquor distillers and others in the business to fix and maintain prices as high as they wish when any other business that attempted to do that would be indicted and convicted under the Anti-trust laws."

The perniciousness of liquor price fixing laws is well analyzed by the "Moreland Commission on the Alcoholic Beverage Control Law," appointed by Governor Rockefeller. It was the Moreland report which caused New York to change its mandatory price fixing statute (which previously was like California's statute) and to pass the present New York statute held Constitutional in *Seagram & Sons v. Hostetter,* 384 U.S. 35, 16 L.Ed. 336, 86 Sup.Ct. 1254. The Moreland Commission found at page 1 of the report that:

> "The mandatory price controls should be eliminated because (1) New York consumers are compelled to pay unnecessarily high prices for packaged liquor, (2) competition is stifled and economical waste encouraged."

As the Commission pointed out, the only effect of mandatory price fixing could be to make drinking eco-

nomically impossible for low income groups to the benefit of the wealthy and the disadvantage of the poor. This, as argued below, would appear to be a distinction in violation of the Equal Protection Clause of the Fourteenth Amendment since, in effect, it would enact Prohibition for the poor but not for the rich.

Further, it has been pointed out to the licensees that the Supreme Court is the only court available now to rule on the constitutionality of the California statute. In *Dave's Market v. Department of Alcoholic Beverage Control,* (U.S. Dist. Ct. for No. Dist. of California, So. Div., No. 41103) a three Judge District Court was convened but sent the matter back for determination on State issues. When the case was returned to the Federal Court, the determination was made that Federal issues must necessarily have been determined along with the State issues and therefore, appeal to the Supreme Court was the only remedy. This was also essentially the decision in the District Court case of *Wilke & Holzheiser v. Department of Alcoholic Beverage Control,* 266 F.Supp. 168.

CONCLUSION

In conclusion, the effect of allowing a system within the most populous State whereby an industry dominated by four giants has powers denied to any other business, is far reaching. The effects on interstate commerce, as pointed out in *Burke v. Ford, supra,* are clear. The liquor comes into California from outside the state and the consultations that go on between wholesalers

who represent various distillers and the distillers they represent, in order to set the most profitable price, provide avenues for legalized conspiracy that can affect prices in all states. The Twenty-First Amendment allows a state to forbid the sale of liquor within its borders, but like the familiar analogy of the corporate entity, once liquor is sold within a state the laws under which it is sold must be reasonable and non-discriminatory, and they must have some rational foundation and not merely be designed to serve one powerful interest group. The Twenty-First Amendment was certainly not designed to put the liquor industry into a more favored position than it had been prior to the passage of the Eighteenth Amendment as would be the situation if the Supreme Court allows § 24755 of the Business and Professions Code of California to remain in effect.

Dated, San Francisco, California,
April 11, 1968.

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(Appendices Follow)

Appendix A

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

Malcolm E. Harris, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Charles Cohon and Irving Sirbu, Respondents.	1 Civil 22,905
James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Jack Dorian and Walter Matoff, Respondents.	1 Civil 22,906
James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Catherine Carella and Michael Carella, Respondents.	1 Civil 22,994

James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Michael A. Carella and Pasquale Maniscalco, Respondents.	1 Civil 22,995
James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Charles Cohon and Irving Sirbu, Respondents.	1 Civil 23,282
James O. Reimel, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Fred Lancelotti and Henry J. Lancelotti, Respondents.	1 Civil 23,401

OPINION

These consolidated appeals primarily concern the interpretation of Business and Professions Code[1] sec-

[1]All statutory references unless otherwise noted are to Business and Professions Code.

tion 24755 as amended in 1961 which relates to minimum retail price schedules for branded distilled spir mum retail price schedules for branded distilled spirits. The section is part of the Alcoholic Beverage Control Act (§§ 23000-25762) which herein will be called the Act.

The individual respondents and real parties in interest were holders of off-sale general liquor licenses issued by the Department of Alcoholic Beverage Control (hereinafter called Department). Against each respondent licensee the Department filed an accusation alleging the sale of branded distilled spirits at prices less than the stipulated minimum retail schedules duly filed with the Department. After hearings the Department found the charges to be true. As to some of respondent licensees, license suspension was ordered; as to the others the sanction was license revocation.

Appeals in each case were taken to the Alcoholic Beverage Control Appeals Board (hereinafter called Appeals Board). The Appeals Board reversed the several decisions of the Department. It held in each case that the record did not establish publication as required by section 24755; therefore the evidence did not support the Department's findings that the licensees sold at prices "below the minimum retail price schedule duly filed."

The Department thereupon filed in the superior court applications for mandate (Code Civ. Proc., § 1094.5) seeking reversal of the decisions of the Ap-

peals Board. The superior court, after hearings, entered judgment in each case denying the prayed for relief. Each of the judgments recited: "The foregoing judgment is rendered by this Court upon the grounds that, as determined by the Appeals Board in its decision, the record does not contain substantial evidence that the petitioner sustained its burden of proving publication of the price schedule in the manner required by section 24755 of the Business and Professions Code."

It is from these judgments that the instant appeals were taken.

As pertinent here section 24755 provides:

"(a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

"(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. . . . *Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.*

(c) Such schedule shall be filed by (1) the owner of the brand [or any of certain other designated persons]. . . .

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package. . . ."[2] (Emphasis added.)

Under the authority of section 24757[3] the Department adopted its rule 99 (k) (tit. IV, Cal. Adm. Code) which as pertinent here states: "(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule *to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof.* . . ." (Emphasis added.)

It seems proper at this point before discussing the respective contentions of the parties to consider certain fundamental principles relating to the enforcement of the Act.

Our Supreme Court in Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal.2d 141, 147, has said, "A state has particularly wide powers with respect to the . . . traffic in alcoholic beverages and may provide for their prohibition or im-

[2] Section 24755 also delineates "trading area" for which the minimum retail price schedules may be filed separately and differently. Here we are concerned with the northern California trading area. Effective November 8, 1967, section 24755 was again amended. Among the changes the requirement of publication was deleted.

[3] "The [D]epartment may adopt such rules as it determines to be necessary for the administration of sections 24754 to 24756 inclusive. . . ." (Bus. & Prof. Code, § 24757.)

pose such conditions and regulations as it may deem proper."

This court in State Bd. of Equalization v. Superior Court, 5 Cal.App.2d 374, 377, stated: "Unlike the rule with respect to the right to deal in ordinary commodities . . . there is no inherent right in a citizen to sell intoxicants [citations]; and a license to do so is not a proprietary right within the meaning of the due process clause of the Constitution ([Cal.] Const., art. I, § 13), nor is it a contract [citation]; it is but a permit to do what would otherwise be unlawful, . . ." (See also Kirchhubel v. Munro, 149 Cal.App.2d 243, 247-248; Schaub's Inc. v. Dept. of Alcoholic Beverage Control, 153 Cal.App.2d 858, 869-870.)

Section 24755 does not require as an element of its violation that a sale below the effective minimum retail price schedule be made *knowingly*. A strict liability is imposed on those exercising the privilege of selling alcoholic beverages. (See DeMartini v. Department of Alcoholic Beverage Control, 215 Cal.App. 2d 787, 815; Morell v. Department of Alcoholic Beverage Control, 204 Cal.App.2d 504, 513; Munro v. Alcoholic Beverage Control Appeals Board, 154 Cal. App.2d 326, 329; Mercurio v. Department of Alcoholic Beverage Control, 144 Cal.App.2d 626, 630-631.)

The duty to enforce and administer the Act is vested in the Department, and "it has been given a broad range of power and discretion in carrying out this duty." (Harris v. Alcoholic Beverage Control Appeals Board, 238 Cal.App.2d 24, 30.)

We shall state the several contentions on these appeals as they are outlined by respondents.

The first and principal contention of respondents[4] may be stated as: *The record discloses that the Department did not sustain its burden of proving publication of the minimum retail price schedule as required by section 24755.*

The specific contention of respondents takes the following form. In order that section 24755 be violated there must be a sale below the "effective" filed minimum retail price schedule (§ 24755(e)). For such a schedule to be "effective" there must have been a compliance with paragraph (b) of the section which provides that the "person filing such schedule shall cause [it] to be published in a manner which will result in each retailer affected by such schedule being advised of [its] contents." The schedule was not so published; it follows that there was no "effective" price schedule and accordingly no violation.

Further it is contended: The specification that the schedules be published in a manner which will result in each retailer being advised of their contents is a requirement of some form of actual notice by personal service or by mail.

The records of the administrative hearings show the following: Publication of the minimum retail price schedule was made in the Beverage Industry News, a privately owned monthly publication in business since 1946. It was a trade journal of the liquor

[4]This is the only contention urged by respondent Appeals Board.

industry in general circulation in the area here concerned. Its subscription price was $7.50 per year. Since 1946, copies of the publication had been mailed monthly to a majority of the off-sale retail licensees authorized to sell alcoholic beverages in the northern California trading area.

It is clear that publication here was not made in a manner designed to effect actual notice by personal service on, or mailing to, each retailer affected.

In cases dealing with a statutory requirement of publication in a newspaper, California's appellate courts have defined publish as to "disclose, reveal, proclaim, circulate or make public" (Application of Monrovia Evening Post, 199 Cal. 263, 266; Western States Newspapers, Inc. v. Gehringer, 203 Cal.App. 2d 793, 795) and "'to proclaim, to advertise.'" (Arthur v. City of Petaluma, 27 Cal.App. 782, 788.)[5]

Black's Law Dictionary (4th ed. 1954) defines "publish" as "To make public; to circulate; to make known to people in general. . . . An advising of the public or making known of something to the public for a purpose." It defines "publication" as "To make public; to make known to people in general; . . . The act of publishing anything; offering it to public notice, or rendering it accessible to public scrutiny." Webster's New International Dictionary, Unabridged (2d ed. 1953), defines "publish" as "To make public announcement of; to make known to people in general; . . . To

[5]We consider "publish" and "publication" in the sense of transmitting information or knowledge. They have, of course, other connotations such as in the law of defamation, negotiable instruments, wills, etc.

promulgate or proclaim, as a law or an edict. . . . To make public in a newspaper, book, circular or the like." (See also 73 C.J.S. 1250-1251.)

"Publish" has been held not to be synonymous with "communicate" or "to divulge" or "to make known." (United States v. Baltimore Post Co., 2 F.2d 761, 764; 15A C.J.S. 84; 51 C.J.S. 463.) Inseparable from the term is the idea of publicity and circulation. (United States v. Williams, 3 F. 484, 486; People v. Burns, 166 N.Y.S. 323, 325; Cox v. First Mortgage Loan Co., 173 Okla. 392, 394 [48 P.2d 1060, 1063.]) "The thought running through all the uses of the words . . . is an advising of the public or the making known of something to the public for a purpose. . . ." (Estill County v. Noland (Ky.) 175 S.W. 2d 341, 346; Marx v. United States, 96 F.2d 204, 206; Associated Press v. International News Service, 245 F. 244, 251.)

We have before us conflicting statutory provisions. If we accept respondents' interpretation we must ignore the phrase, "shall cause such schedule to be published." Conversely, if we give "published" its ordinary and accepted meaning we must hold that actual notice to each licensee is not required.

If reasonably possible, conflicting provisions of a statute should be reconciled and brought into harmony with each other (Hough v. McCarthy, 54 Cal.2d 273, 279; County of Placer v. Aetna Cas. etc. Co., 50 Cal. 2d 182, 188-189.) In doing so, effect and meaning should be given to each word and phrase under consideration. (Select Base Materials v. Board of Equal., 51 Cal.2d 640, 645; Brown v. Cranston, 214 Cal.App.

2d 660, 672.) A construction should be avoided which implies that the Legislature was ignorant of the meaning of language employed, or that it used words in vain, the legal intendment being that each and every clause was inserted for some useful and reasonable purpose. (Prager v. Isreal, 15 Cal.2d 89, 93; Siler v. Industrial Acc. Com., 150 Cal.App.2d 157, 161.) The use of a word with settled legal meaning is some indication that such meaning was intended. (Perry v. Jordan, 34 Cal.2d 87, 93; City of Long Beach v. Payne, 3 Cal.2d 184, 191.)

In its interpretation of section 24755 the Department has given to the word "published" its accepted meaning. It has concluded that the intent of the Legislature was that the price schedules be published in a manner *most likely* to give notice to the affected licensees. (Rule 99(k) requiring publication "in a trade journal of general circulation" gives rational effect to this interpretation. Such a publication may reasonably be considered as most likely to give the desired notice

We are required to accord great respect to this interpretation by the Department. It must be followed unless it appears to be clearly erroneous. (Cohon v. Department of Alcoholic Beverage Control, 218 Cal. App.2d 332, 339; see also Adoption of Parker, 31 Cal. 2d 608, 615; Bodinson Mfg. Co. v. California Employment Com., 17 Cal.2d 321, 325-326; Neely v. California State Personnel Bd., 237 Cal.App.2d 487, 491; Rich v. State Board of Optometry, 235 Cal.App.2d 591, 604.) Accordingly, we now direct our inquiry

into the reasonableness of the Department's interpretation.

The search for the Legislature's intent is aided by a consideration of section 24875 of the Act relating to minimum price schedules for wine. That section provides for publishing (by the person filing the schedules) in *a trade journal of general circulation* among affected licensees. It then recites: *"Instead of publishing* [*such person*] *may mail his price schedule or any changes therein to licensees affected."* (Emphasis added.) An intent to give the word "publishing" a meaning other than the giving of actual notice as insisted by respondents, is demonstrated. Elsewhere in the Act where actual notice is intended, appropriate words are used, i.e., sections 23328, 23329, 23987, prescribing "written notice," and section 25760 calling for notice "personally or by mail." "[I]t is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law." (Stillwell v. State Bar, 29 Cal. 2d 119, 123.)

Throughout the statutes and codes of this state the Legislature has many times provided for publication of notices. So far as we can determine the term has never been construed to require actual notice. In construing a provision of any code, reference may properly be made to other codes or statutes for clarification. (In re Porterfield, 28 Cal.2d 91, 100; People v. Vassar, 207 Cal.App.2d 318, 323.) "When

the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction." (Perry v. Jordan, supra, 34 Cal. 2d 87, 93.)

It seems reasonable to conclude that the Legislature intended in its amended section 24755 the common and accepted meaning of the word "published."

However, the Department was required, as are we on these appeals, to give meaning, if possible, to the words *"in a manner which will result in each retailer . . . being advised of* [*its*] *contents."* If necessary, in order to reach such a result, we can depart from a literal construction of the words employed. (County of Los Angeles v. Frisbie, 19 Cal.2d 634, 639; In re Kernan, 242 Cal.App.2d 488, 491; Brown v. Cranston, supra, 214 Cal.App.2d 660, 672-673. "[T]he intention of the Legislature must be ascertained, if possible, and, when once ascertained will be given effect, even though it may not be consistent with the strict letter of the statute." (Struckman v. Board of Trustees, 38 Cal.App.2d 373, 376.)

We conclude that the Department's determination that the words in question, in the context of the Act and its section 24755, indicated a legislative intent that the price schedules be published in a manner *most likely* to give notice to the affected licensees is reasonable and correct. This interpretation gives effect to each of the words and phrases under consideration. It brings them to a degree of harmony with

each other not otherwise possible. And it is consistent with the usual meaning given the word "published" by the Legislature and by the courts.

The Department's interpretation is in accord with the general legislative practice of prescribing publication in such a manner as is best designed to give notice to persons concerned.[6] And it imposes no hardship upon the individual licensee who is under an affirmative duty to conduct his business in accordance with law. (See Morell v. Department of Alcoholic Beverage Control, supra, 204 Cal.App.2d 504, 514; Munro v. Alcoholic Beverage Control Appeals Bd., 181 Cal.App.2d 162, 164; Cooper v. State Board of Equalization, 137 Cal.App.2d 672, 678.) If he cannot conveniently check the price schedules filed with the Department he may have the information delivered to him by subscribing to the Beverage Industry News.

Respondents urge that such a construction of section 24755 makes it "incumbent on a retailer to assume the burden of subscribing to a private trade journal which has no official blessing, sponsorship or information at its disposal."

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[6]I.e., Code of Civil Procedure section 1277, in a "newspaper of general circulation . . . printed in the county"; Health and Safety Code section 4785, in a "newspaper having a general circulation in the [sewer] district"; Labor Code section 1181, "by advertisement in at least one newspaper published in each of the cities of Los Angeles, Oakland, Sacramento, San Jose, Fresno, Eureka, San Diego, Long Beach, Alameda, Berkeley, Stockton, San Bernardino, and San Francisco"; Business and Professions Code section 23986, "in a newspaper of general circulation in the city in which the premises are situated"; Revenue and Taxation Code section 3391, publication "within the county as they [the board of supervisors] shall determine most likely to afford adequate notice to owners whose property is upon the delinquent lists."

The Act simply provides that the retailer shall not sell at prices below the effective minimum price schedules under peril of administrative sanction. The publication provisions of section 24755 and rule 99(k) make these price schedules readily available to him. He may, however, obtain the retail price information from the Department where it is on file or in any manner he chooses. As to the claimed compulsion to subscribe to a private trade journal without official blessing or sponsorship, we see no illegality. All statute-directed publications of notice are made (so far as we can determine) in privately owned newspapers or journals. Indeed, as we have previously pointed out, section 24875 of the Act expressly calls for publication in a trade journal or industry price book of general circulation among wine licensees.

Respondents point out that prior to the 1961 amendment of section 24755, publication as now directed by rule 99(k) was then also directed by Department rule. Publication was not then expressly directed by the Act as it is now. They contend that by amending section 24755 the Legislature is presumed to have intended a change in the method of giving notice to retailer licensees.

By rules of the Department, and of its predecessor agency, the State Board of Equalization, minimum retail price schedules for branded distilled spirits have been published (except for a few years during and after World War II) since 1939[7] in a trade jour-

[7]Rule 42 (1939, 1940) and rule 22 (1941-1944), State Board of Equalization, rule 99, title IV, California Administrative Code (1947).

nal of general circulation. If the Legislature intended by its 1961 amendment of section 24755 that such publication be discontinued in favor of actual notice it seems likely that it would not have used the word "published." Instead it would have called for "written notice" or notice "personally or by mail" as it has elsewhere in the Act. (See for instance, §§ 23328, 23329, 23987, 25760.) The circumstances seem more likely to indicate an intent to confirm the practice of publication by placing express direction therefor in the Act.

While an intention to change the law is usually inferred from a material change in the language of the statute (Loew's Inc. v. Byram, 11 Cal.2d 746, 750; People v. Weitzel, 201 Cal. 116, 118) "the circumstances may indicate merely a legislative intent to clarify the law." (W. R. Grace & Co. v. Cal. Emp. Com., 24 Cal.2d 720, 729; see also San Joaquin Ginning Co. v. McColgan, 20 Cal.2d 254, 264; Martin v. California Mutual B. & L. Assn., 18 Cal.2d 478, 484; Union League Club v. Johnson, 18 Cal.2d 275, 279; County of Alameda v. Clifford, 187 Cal.App.2d 714, 723.)

We conclude that the Department's interpretation of the publication provisions of section 24755 is reasonable and certainly not "clearly erroneous." It should be followed by us. (See Cohon v. Department of Alcoholic Beverage Control, supra, 218 Cal.App.2d 332, 339.) Accordingly, the record before us discloses that the Department did sustain its burden of proving publication of minimum retail price schedules as required by section 24755.

Respondent licensees' second contention is stated as *"Section 24755 of the Business and Professions Code and Rule 99 are unconstitutional."*

The argument here is that section 24755 as amended, "is now nothing more than a naked 'price fixing' statute by which the Legislature has unlawfully delegated its power to producers and brand owners (who no longer are required to be in fair and open competition) and which permits them unilaterally to fix the price at which liquor must be retailed without any protective 'standards,' 'price guidelines,' 'ordinary play of competition' or 'bargaining processes' whatsoever." Such a grant of power, it is argued, is an unlawful delegation of legislative authority and is so arbitrary as to amount to a denial of due process of law as guaranteed by the federal and state Constitutions.

The appellate courts of this state apparently have never considered the constitutionality of section 24755 as amended in 1961. However, the general argument now made by respondent licensees has frequently been directed at distilled spirits minimum price statutes and regulations both in this state and elsewhere. While other states are not in agreement, the question in California appears to be resolved by the cases of Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal.2d 349, and Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141. These cases concerned the mandatory fair trade minimum price fixing provisions of the Act as they existed prior to the 1961 amendment of section 24755.

The earlier law permitted (and still permits) fair trade contracts relating to the sale of any branded distilled spirits, "which is in any fair and open competition with alcoholic beverages of the same general class produced by others. . . ." (Section 24750.) Section 24755 (before its 1961 amendment) provided that all "distilled spirits sold at retail shall be . . . sold pursuant to [such a fair trade] contract." As amended in 1961, section 24755 provides that no branded distilled spirits shall be sold at retail at a price below the filed effective minimum price schedule, without regard to whether there is a related fair trade contract.

It will be seen that since 1961 under section 24755 there is no longer a requirement that at least one fair trade contract be negotiated with a retailer, nor is there an express requirement that brands be in fair and open competition with other brands. These omissions, respondents urge, present new questions of constitutionality not decided by *Wilke & Holzheiser, Inc.*, supra, and *Allied Properties,* supra, which should now be considered by this court.

Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra, 65 Cal.2d 349, 365-369, considering the pre-1961 mandatory minimum price fixing provisions of the Act, rejected the contention that they *unlawfully delegated* legislative power by enabling a producer or wholesaler to fix retail prices. It held that (pp. 365-366): "To argue that the Alcoholic Beverage Control Act unlawfully delegates legislative power because it is a 'price-fixing act' is to

overlook the crucial distinction between the fixing of a price for *all* products in a given market and the setting by the producer of the retail price at which *his own* product is to be sold." The court found no tendency in the Act to allow one to regulate the business of his competitors or to exclude potential competitors from the liquor industry. It concluded (p. 367): "To the extent that the retail price maintenance provisions enable a producer to control the bargaining process between those who sell and those who buy his own product, the Legislature could reasonably assume that competition among producers, coupled with the bargaining power of those low overhead retailers who desire lower retail prices, would provide a safeguard against excessive prices." The holding of Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141, generally was to the same effect.

Respondents contend that the earlier statutory requisite of a negotiated fair trade contract was a necessary guideline and safeguard now wholly missing from the Act. We cannot agree that the former requirement that a producer establish a minimum price for his product by securing a fair trade contract with at least *one* retailer before it became binding on all retailers was in substance or practical effect any different from the present section 24755 requirement that he unilaterally fix such a price. In each case the producer effectively sets the price for which his own product is to be sold. The competition between producers and their respective brands is not affected.

This, coupled with the bargaining power of low overhead retailers who desire lower retail prices, could, as said by the *Wilke & Holzheiser* court, reasonably be assessed by the Legislature to be a safeguard against excessive prices.

Nor do we deem the absence from section 24755 of the specific requisite that the brands be in "fair and open competition with alcoholic beverages of the same general class produced by others" to create a constitutional infirmity. Such fair and open competition is a positive requirement of the Cartwright Antitrust Law (Bus. & Prof. Code, §§ 16700-16758). Minimum retail price schedules resulting from any combination for the purpose of stifling fair and open competition would be an offense against that law. (DeMartini v. Department of Alcoholic Beverage Control, supra, 215 Cal.App.2d 787, 808-809.)

Respondents complain that the Department is no longer required under section 24755 to produce affirmative evidentiary proof, or make express findings, that the brands involved are in such fair and open competition. This contention assumes that there was such a requirement prior to 1961. DeMartini v. Department of Alcoholic Beverage Control, supra, 215 Cal.App.2d 787, 808-809, considering the pre-1961 Act, held that certain statutory presumptions[8] constituted

[8]Code of Civil Procedure section 1963, subdivision 15, "that official duty has been regularly performed"; *idem*, subdivision 19, that "private transactions are fair and regular"; *idem*, subdivision 33, that "the law has been obeyed." (See Evid. Code, § 12.) They were repealed effective January 1, 1967, and reenacted in substance elsewhere.

evidence, in similar proceedings before the Department, that the filed price schedules were in fair and open competition. (See also Dave's Market, Inc. v. Department of Alcoholic Beverage Control, 222 Cal. App.2d 671, 677-678; United Liquors v. Department of Alcoholic Beverage Control, 218 Cal.App.2d 450, 453-454.) DeMartini v. Department of Alcoholic Beverage Control, supra (pp. 813-814), also held that express findings that the products were in fair and open competition were not required.

Applying the principles announced in Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra, 65 Cal.2d 349, and Allied Properties v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 141, we hold section 24755 and rule 99 not to be violative of the due process clauses of the federal and state Constitutions.

Respondents Carella and Carella (1 Civ. 22994) and Carella and Maniscalco (1 Civ. 22995) further contend: *"The Department erred by considering four unproven prior accusations in determining the penalty imposed herein."*

Section 23095 provides, in part, as follows:

"Whenever a decision of the department suspending a license for 30 days or less becomes final, whether by failure of the licensee to appeal the decision or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of such suspension, petition the department for permission to make an offer in compromise, . . ."

Four previous accusations concerning the named licensee respondents were found to be true by the Department. In each case it was decided that the license be suspended for 30 days or less. As to each decision, administrative or judicial review was pending when the parties stipulated to a penalty compromise (§ 23905) under which respondents would make a payment of $2,000. The compromise stipulation further provided that one case would be "permitted to become final" while the suspensions in the other "proceedings mentioned were merged." The $2,000 payment was made and the respective reviews or appeals were dismissed.

In the instant cases the Department found each of the four prior decisions was a final determination and considered all of them in fixing the penalties. Respondents contend that such findings were not supported by the evidence and that such consideration was error.

In administrative matters such as those before us, consideration of prior disciplinary proceedings is entirely proper, and the prior record of a licensee is relevant and material evidence of his knowledge of and compliance with the pertinent laws. (Dave's Market, Inc. v. Department of Alcoholic Beverage Control, supra, 222 Cal.App.2d 671, 679-680.)

We conclude that the evidence before the Department gave sufficient support to the questioned findings, and that the Department did not err in considering the four prior proceedings.

Certain respondent licensees have in their briefs urged several additional points which were not raised before the Department, the Appeals Board or the superior court. With the hereinafter discussed exception these points relate to questions of fact or mixed questions of fact and law which could have been presented to and considered by the Department. Under well-established rules such matters may not be urged for the first time on appeal. (See Ward v. Taggart, 51 Cal.2d 736, 742; Damiani v. Albert, 48 Cal.2d 15, 18; Algeri v. Tonini, 159 Cal.App.2d 828, 832.)

We think it proper, however, to consider one matter which is now urged for the first time by the following contention: *The penalties of revocation and suspension ordered by the Department should be vacated and a monetary penalty as provided by section 24755.1 should be applied retroactively.*

In 1965, and following the Department's hearings and decisions in the matters before us, the Legislature enacted section 24755.1. This section provides among other things that the license of a Department licensee shall not be suspended or revoked for a violation of section 24755. It establishes monetary penalties as the sanction for such violations.

Respondent licensees ask us to give retroactive application of section 24755.1 to their cases. We are precluded from doing so by Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, supra, 65 Cal.2d 349, where a similar request was made. The court in *Wilke & Holzheiser, Inc.* (p. 373) held "Section 24755.1 clearly does not apply to a license sus-

pension or revocation preceding its effective date." However, in view of the current legislative intent concerning license revocation and suspension demonstrated by section 24755.1 the Department may elect to review respondent licensee's penalty assessments before they are placed in effect, as permitted by section 24211, added in 1963.

Each of the judgments appealed from is reversed. The superior court in each case will grant a writ of mandate commanding respondent Appeals Board to set aside its decision reversing the decision of the Department and to affirm such decision of the Department.

Elkington, J.

We concur:

Sims, J.

Christian, J.*

Filed November 21, 1967,
Lawrence R. Elkington, Clerk.

*Justice of the Court of Appeal of the State of California, First Appellate District, Division Four, sitting under assignment by the Chairman of the Judicial Council.

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

Malcolm E. Harris, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Appellant, vs. Alcoholic Beverage Control Appeals Board of the State of California; Charles Cohon and Irving Sirbu, Respondents, And 5 companion cases.	1 Civil 22,905 1 Civil 22,906 1 Civil 22,994 1 Civil 22,995 1 Civil 23,282 1 Civil 23,401

OPINION ON DENIAL OF REHEARING

THE COURT:

We have considered the licensee-respondent's respective petitions for rehearing.

Respondents Carella (1 Civ. 22994) and Carella and Maniscalco (1 Civ. 22995) vigorously urge that this court failed to consider an important issue properly raised in their briefs. This issue is stated as "There was no proof of publication of the pertinent minimum price schedules *prior to their effective date.*" The

contention raises a theory relating to the *time* of publication as distinguished from the *fact* or *manner* of publication. We have again reviewed the record. The only pertinent statement of defense raised below alleged: "XI. That said minimum retail price schedules and the filings thereof were invalid and ineffective to establish the minimum resale prices of the distilled spirits subject of the Accusation and did not comply with § 24755 of the Business and Professions Code."

The contention now being discussed reasonably might have been considered as within the issues at the time of the Department hearing. However, the theory was not pointed out, argued or considered at the hearings before the Department, the Appeals Board or the superior court, and the Department was afforded no opportunity to meet it. It is urged for the first time on this appeal. "A party is not permitted to change his position and adopt a new and different theory on appeal." (Ernst v. Searle, 218 Cal. 233, 240-241; 3 Witkin, Cal. Procedure, p. 2264, § 96.) This rule is applicable to appeals such as those before us. (See Nelson v. Department of Alcoholic Beverage Control, 166 Cal.App.2d 783, 788.) Licensee-respondents Lancellotti (1 Civ. 23401) who presented the same point on their appeal concede that it was not urged below by them.

Rehearing denied.

Dated: Dec. 15, 1967.

Sims, Acting P. J.

Filed December 15, 1967,
Lawrence R. Elkington, Clerk.

Appendix B

Served on all parties by certified mail
May 20 1964

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Charles Cohon and Irving Sirbu
dba: Alhambra Drug
2300 Polk Street
San Francisco, California
under the Alcoholic Beverage
Control Act.

AB-2089
File No. 19309; Reg. No. 18069
Time & Place of Hearing:
May 1, 1964, @ 10 a.m.
Ferry Building
San Francisco, California
For Department:
Honorable Stanley Mosk
Attorney General
L. Stephen Porter
Deputy Attorney General
For Appellants: M. M. Bourquin
Submitted on briefs.

Charles Cohon and Irving Sirbu, doing business as Alhambra Drug, have appealed a decision of the De-

27

rtment of Alcoholic Beverage Control determining em to have violated the provisions of section 24755 the Alcoholic Beverage Control Act and rule 99(f) title 4 of the California Administrative Code (sell- below fair trade) thereby establishing cause for cipline under section 24200(a) of the Alcoholic verage Control Act and article XX, section 22 of Constitution. A penalty of revocation of the ense was imposed.

The department alleged and found that on April 962, appellants sold, to an agent of the department, ase of alcoholic beverages, to wit, Gilbey's vodka, a price below the minimum resale price applicable said beverage.

Section 24755 of the Alcoholic Beverage Control Act vides in pertinent part as follows:

"(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail . . . . Any person filing such schedule **shall** *cause such schedule to be published in a manner which will result in each retailer affected* by such schedule *being advised of the contents of such schedule* prior to the effective date thereof." (Emphasis added.)

question presented is whether or not the fore- g provision of section 24755 relative to the pub- ion of the price schedules has been complied with,

so far as the evidence in the record establishes in this case. In support of compliance with the statute, the department introduced into evidence the affidavit of Leroy W. Page, editor and publisher of "Beverage Industry News Price Book" to the effect that said publication is a trade journal of the liquor industry published at San Francisco and is in general circulation in the northern California trading area and, further, that said publication, has "been mailed to a majority of the off-sale retail licensees of the Department of Alcoholic Beverage Control and/or its predecessor in function authorized to sell Distilled spirits including beer and wine in the above-mentioned counties." This affidavit apparently is intended to establish compliance with department rule 99(k), which provides:

> "The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. . . ."

It is obvious that the evidence in this record does not establish compliance with section 24755 relative to publication. That section requires that the publication be in a manner, "which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof." The affidavit of publication does not pur-

port to aver such a fact. Rather, it is limited in its scope to the averment that said publications, "have been mailed to a *majority* of the . . . licensees of the Department." (Emphasis added.) To the extent that rule 99(k) would purport to authorize such limited publication, said rule is in conflict with the requirements of section 24755 and so is, at least to that extent, invalid. (*Blatz Brewing Co. v. Collins,* 69 Cal. App.2d 639, 160 P.2d 37; *Tux Ginger Ale Co., Ltd. v. Davis,* 12 Cal.App.2d 73, 54 P.2d 1122; *American Distilling Co. v. State Bd. of Equalization,* 55 Cal.2d 799, 131 P.2d 609; *Blatz Brewing Co. v. Collins,* 88 Cal. App.2d 438, 199 P.2d 609; *Whitcomb Hotel v. Calif. Employment Commission,* 24 Cal.2d 753, 151 P.2d 233; *Harris v. Alcoholic Beverage Control Appeals Bd. & Payseno,* 204 Cal.App.2d 729, 22 Cal.Rptr. 634; 2 Cal. Jur.2d, Administrative Law, section 72.)

The evidence adduced by the department, in addition to failing to establish proper publication pursuant to the provisions of section 24755, failed to establish that appellants had actual notice of the schedule of minimum prices here involved. In this respect, this case is to be distinguished from other similar cases considered by us.

Failure to comply with the requirements for the publication of minimum price schedules renders ineffective the attempt to establish such a schedule of minimum prices, since the burden rests upon the department to prove all aspects of its case. (See appeal of Wilke & Holzheiser, AB-518.)

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

Robert H. Haden, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Arthur W. Belcher
Leverette D. House
Sacramento, California
May 15, 1964

Served on all parties by certified mail
Dec 17 1964

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Michael A. Carella and
Pasquale J. Maniscalco,
dba: Carella's Pharmacy
2049 Irving Street,
San Francisco, California,
under the Alcoholic Beverage
Control Act.

AB-2185
File No. 60850; Reg. No. 2423
Time & Place of Hearing:
November 6, 1964, @ 10 a.m.
World Trade Center
San Francisco, California
For Department:
Honorable Thomas C. Lynch
Attorney General
L. Stephen Porter
Deputy Attorney General
For Appellants: M. M. Bourquin, Esq.
No appearance at oral. (Submitted on written argument.)

The department alleged, and in its decision determined, that appellants violated the fair trade provisions of the Alcoholic Beverage Control Act in that

they sold certain alcoholic beverages at prices less than "the stipulated minimum price provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control." In addition to the question of the constitutionality of the statute and the argument that the system for price fixing provided violated federal anti-trust laws, appellants raised the issue that the price schedules were not published in accordance with the requirements of the statute, and the department's decision is therefore subject to reversal. It is this latter question with which we will here concern ourselves.

Appellants rely upon our recent decision in the appeal of Cohon and Sirbu, AB-2089, in their argument (see also AB-2181). In the Cohon and Sirbu case, the record failed to establish that the licensee had, in fact, received a copy of the industry publication (Beverage Industry News Price Book) in which had been published the price schedules for the beverages involved. (This is also true in the Carella case, AB-2181.) The record in this case establishes that a copy of this publication was mailed to these appellants.

On the issue of publication, LeRoy W. Page, editor and publisher of "Beverage Industry News Price Book," testified that said publication is a trade journal of the liquor industry published at San Francisco and is in general circulation in the northern California trading area. Those licensees subscribing to the publication are charged a subscription of $7.50 per year. Concerning the extent of subscription to the publication, Page testified as follows:

"Q. It is $7.50 a year. Do all of the off-sale retail licensees subscribe to that book?

"A. Well, I don't believe all of them do.

"Q. Do you know how many? What fractions do and what fractions do not?

"A. Not off-hand, no.

"Q. Do you mail it to all whether they subscribe or not?

"A. Yes.

"Q. What is the source of your statement there? What is your information on that?

"A. What?

"Q. You don't do it personally. What do you base that statement on that you mail it to all whether they subscribe or not?

"A. Oh, we get the list of license holders from a firm who makes it their business to sell lists of all types, and we know that they have all of the licensees listed, and we get it and make up our own list by areas and mail it to them.

"Q. What firm do you get that list from, please?

"A. That's the—let's see: what is the name? Business Extension Bureau.

"Q. That is a private enterprise?

"A. Yes.

"Q. What are they—people that prepare and sell lists?

"A. Yes.

"Q. To manufacturers or anyone that has a need for them? You don't get such a list from the State, do you?

"A. No.

"Q. Or the Department of Alcoholic Beverage Control?

"A. No, not direct.

"Q. Well, how do you get it indirectly?

"A. Through the Business Extension Bureau who have the persons on the job in Sacramento to get it——

"Q. So you understand.

"A. ——from this department. I have been there and checked it.

"Q. You have seen this private enterprise Business Extension Bureau and have seen a man in Sacramento checking the list?

"A. No, but I have been told by the department—there is one of, I believe, thirteen all together that get the list.

"Q. Uh huh. I see.

"A. And they say that through a new system they were working on it will be available to anyone who wants it and can pay whatever price it takes to compile.

"Q. Do you check that list furnished by that concern with the Department of Alcoholic Beverage Control?

"A. We are being audited right now by the Business——

"Q. Business Practices Unit?

"A. No, Business Publications Audit—it's an outfit that audits trade papers so the advertiser is assured that the statements we make are true, and he is going to Sacramento for that very reason because he won't take our word for it.

"Q. You haven't answered my question. That is going on now. But in November of '63 and before over the years have you made an attempt to check the list furnished by this private concern to ascertain whether they accurately report the off-sale retail licensees?

"A. If you mean going to Sacramento and checking our list against the one in Sacramento, the answer is no.

"Q. Or by exchange of correspondence?

"A. No. In a personal way, yes.

"Q. What?

"A. In discussing it with the ABC people in Sacramento on periodic visits.

"Q. Give us an example. Do you take the list and sit down and check it?

"A. No, no—I ask who is getting it now and how they obtain it and have been assured they have somebody on the job constantly getting these names.

"Q. Who is on the job?

"A. The Business Bureau Extension.

"Q. The private concern?

"A. Yes."

* * *

"Q. Mr. Page, does the State pay any of the expense or cost of publication of Beverage Industry News?

"A. No.

"Q. I mean by the State, I mean to include the Department of Alcoholic Beverage Control.

"A. No."

(R.T. 12:3-30; 13:1-30; 14:1-14; 14:21-26.)

The testimony of Mr. Page continues to the effect that while said publication goes to the great majority of licensees, about 75% of whom are subscribers, he could not testify that all licensees receive said publication. *Section 24755 (b) requires the filing of a minimum retail price schedule with the department and publication of said price schedule "in a manner*

which will result in each retailer affected by such schedule being advised of the contents of such schedule". (Emphasis added.) Subsection (e) of section 24755 provides:

> "No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division."

It is our interpretation of these sections that in order for there to be an "effective filed price" for the beverage involved, the record must show compliance with the mandatory provisions of section 24755(b) as to filing with the department and publication in the manner prescribed. The offense is not that of selling below the minimum filed price, but rather, of selling, in the language of the statute itself, below the *"effective* filed price." (Emphasis added.) And to be "effective", the price must be not only filed but also published as required by law. If all that was required was the simple filing of the price schedule with the department, there would have been no need for the Legislature to *require* publication in the manner indicated and to also insert the adjective "effective" in subsection (e). Obviously the two provisions are related and must be read together. Such interpretation gives meaning to the express language employed by the Legislature.

Section 24755 is clear in its requirement that publication ". . . shall . . . be . . . in a manner which will

result in each retailer affected . . . being advised . . ." Since to be "effective" the schedule must be published in accordance with the provisions of this section, the record must contain substantial evidence of compliance therewith. In our opinion, the record in this case does not establish publication as required by the statute, and so the evidence does not support the department's finding that appellants sold at a price below the minimum retail price schedule duly filed.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

/s/ Robert H. Haden
Robert H. Haden, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Arthur W. Belcher
Leverette D. House
Sacramento, California
December 11, 1964

Served on all parties by certified mail
Dec 17 1964

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Catherine and Michael Carella,
dba: Carella Liquors,
1907 Ocean Avenue,
San Francisco, California,
Respondents and Licensees,
under the Alcoholic Beverage
Control Act.

AB-2181
File No. 22786; Reg. No. 2422

Time & Place of Hearing:
November 6, 1964, @ 10 a.m.
World Trade Center
San Francisco, California

For Department:
Honorable Thomas C. Lynch
Attorney General
L. Stephen Porter
Deputy Attorney General

For Appellants: M. M. Bourquin, Esq.
No appearance at oral. (Submitted on written argument.)

This is a "fair trade" case involving a licensee who has been before this board on similar matters on many

occasions. The alleged violation in this case follows the same general pattern as presented in the other fair trade cases coming before us in which the constitutionality of the fair trade provisions of the Alcoholic Beverage Control Act has been attacked. That is to say, there is no dispute concerning the fact of the sale as set forth in the department's decision. It would add little to set forth that information here.

In addition to the issue of the validity of the statute and rules, appellants question compliance with the publication provisions of section 24755(b). In this assertion they rely upon our recent decision in the appeal of Cohon and Sirbu, AB-2089. The facts of this case on this issue are on all fours with the facts in AB-2089, and our decision in that case is determinative here.

The only evidence of publication consists of the affidavit of LeRoy W. Page, editor and publisher of "Beverage Industry News Price Book", to the effect that said publication is a trade journal of the liquor industry published at San Francisco and is in general circulation in the northern California trading area, and, further, that said publication has:

> ". . . been mailed to a majority of the off-sale retail licensees of the Department of Alcoholic Beverage Control and/or its predecessor in function authorized to sell Distilled spirits including beer and wine in the above-mentioned counties."

As stated by us in the Cohon and Sirbu case, such evidence fails to establish compliance with the publication provisions of section 24755 and requires rever-

sal of the department's decision. As we stated in this earlier decision:

"Section 24755 of the Alcoholic Beverage Control Act provides in pertinent part as follows:

> "'(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail . . . . Any person filing such schedule **shall** *cause such schedule to be published in a manner which will result in each retailer affected* by such schedule *being advised of the contents of such schedule* prior to the effective date thereof.' (Emphasis added.)

"The question presented is whether or not the foregoing provision of section 24755 relative to the publication of the price schedules has been complied with, so far as the evidence in the record establishes in this case. In support of compliance with the statute, the department introduced into evidence the affidavit of Leroy W. Page, editor and publisher of 'Beverage Industry News Price Book' to the effect that said publication is a trade journal of the liquor industry published at San Francisco and is in general circulation in the northern California trading area and, further, that said publication, has 'been mailed to a majority of the off-sale retail licensees of the Department of Alcoholic Beverage Control and/or its predecessor in function authorized to sell Distilled spirits including beer and wine in the above-mentioned coun-

ties'. This affidavit apparently is intended to establish compliance with department rule 99(k), which provides:

> "'The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and for every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. . . .'

"It is obvious that the evidence in this record does not establish compliance with section 24755 relative to publication. That section requires that the publication be in a manner, 'which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.' The affidavit of publication does not purport to aver such a fact. Rather, it is limited in its scope to the averment that said publications, 'have been mailed to a *majority* of the . . . licensees of the Department.' (Emphasis added.) To the extent that rule 99(k) would purport to authorize such limited publication, said rule is in conflict with the requirements of section 24755 and so is, at least to that extent, invalid. (*Blatz Brewing Co. v. Collins,* 69 Cal.App.2d 639, 160 P.2d 37; *Tux Ginger Ale Co., Ltd. v. Davis,* 12 Cal.App.2d 73, 54 P.2d 1122; *American Distilling Co. v. State Bd. of Equalization,* 55 Cal.2d 799, 131 P.2d 609; *Blatz Brewing Co. v. Collins,* 88 Cal.App. 2d 438, 199 P.2d 609; *Whitcomb Hotel v. Calif. Employment Commission,* 24 Cal.2d 753, 151 P.2d 233; *Harris v. Alcoholic Beverage Control Appeals Bd. &*

Payseno, 204 Cal.App.2d 729, 22 Cal.Rptr. 634; 2 Cal. Jur.2d, Administrative Law, section 72.)

"The evidence adduced by the department, in addition to failing to establish proper publication pursuant to the provisions of section 24755, failed to establish that appellants had actual notice of the schedule of minimum prices here involved. In this respect, this case is to be distinguished from other similar cases considered by us.

"Failure to comply with the requirements for the publication of minimum price schedules renders ineffective the attempt to establish such a schedule of minimum prices, since the burden rests upon the department to prove all aspects of its case. (See appeal of Wilke & Holzheiser, AB-518.)"

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

/s/ Robert H. Haden
Robert H. Haden, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Arthur W. Belcher
Leverette D. House
Sacramento, California
December 11, 1964

Served on all parties by certified mail
Jan 27 1965

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Jack Dorian & Walter Matoff
dba: Acme Wine & Liquors
5210 Mission Street
San Francisco, California
Respondents and Licensees
under the Alcoholic Beverage
Control Act.

AB-2258
File No. 14662; Reg. No. 2890
Time & Place of Hearing:
December 4, 1964, @ 10 a.m.
World Trade Center
San Francisco, California
For Department:
Honorable Thomas Lynch
Attorney General
L. Stephen Porter
Deputy Attorney General
For Appellants:
M. Mitchell Bourquin, Esq.
(No appearance at oral
argument.)

This is another "fair trade" case involving the sale of alcoholic beverages in violation of section 24755 of

the Alcoholic Beverage Control Act and related rule 99(f), title IV, California Administrative Code.

The department in its decision found that appellants on January 3, 15, and 31, 1964 (three counts) did sell distilled spirits at a price less than the price provided for in the minimum retail price schedule filed with the department. The department imposed a penalty of suspension of the license privilege for 45 days on each count; said penalty is to run concurrently.

Appellants' appeal follows the same pattern that has been asserted in numerous fair trade cases coming before us and may be summarized as follows:

> The department has proceeded in excess of its jurisdiction because:
>
> I
>
> Sections 24752-24757 of the Alcoholic Beverage Control Act and rule 99 California Administrative Code are unconstitutional and invalid. (a) Unlawful delegation of legislative power and authority. Legislature failed to establish standards of control.
>
> (b) Public deprived of the protection of fair and open competition in violation of the California Constitution, Sherman Anti-Trust Act, and the Cartwright Act.
>
> (c) Fair trade provisions nullify purpose and policy of this state as to sale of alcoholic beverages within this state.
>
> (d) Fair trade provisions nullify state policy in that the fair trade provisions and rules permit

excessive consumption of alcoholic beverages and intemperance by the "validating" of resale retail prices for distilled spirits under "private brands."

(e) Fair trade provisions promote . . . agreement . . . and conspiracy between manufacturers and brand owners to divide the market to exclude competition and to maintain monopoly control.

(f) That the price schedules sought to be enforced were not published as required by law.

II

That the department has proceeded without and in excess of its jurisdiction and has not proceeded in the manner required by law in the following particulars:

(1) In taking official notice and giving any consideration to any earlier accusations which were settled and compromised before and without any final substantiation or determination of the charges involved.

(2) Price fixing authorized by section 24755 constitutes a restraint of trade and commerce among the several states in violation of the Sherman Anti-Trust Act.

(3) Minimum prices sought to be enforced were fixed by agreement in violation of the Sherman Anti-Trust Act for the purpose of limiting and suppressing competition and to deny the consumer the benefit of protection of the same.

III

The department's decision is not supported by the findings and the findings are not supported by the evidence.

IV

That the fair trade provisions of the Alcoholic Beverage Control Act and the related rules violate article XX, section 22 of the California Constitution, the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States, and article I, section 13 of the California Constitution.

V

That the minimum schedules were accepted by the department without any information or investigation of cost—production—manufacturing of the distilled spirits subject thereof or the reasonableness thereof to the consumer in violation of the Sherman Act, the Cartwright Act, and the Alcoholic Beverage Control Act of the State of California.

The department's decision contains the following:

"FINDINGS OF FACT:

"COUNT I

"It is true that on January 3, 1964 that the above named licensees at the above designated licensed premises did sell distilled spirits at retail to Special Investigator J. Derenzo of the Department of Alcoholic Beverage Control at a price less than the stipulated minimum price provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, as follows;

"Item	Lawful Minimum Retail Price	Price Paid	Difference
Three (3) 4/5 qts. Ancient Age Straight Bourbon Whiskey, 86 proof	$ 4.99 ea. $14.97	$ 3.50 ea. $10.50	$1.49 ea. $4.47
4% Sales Tax	.60	–0–	.60
Total	$15.57	$10.50	$5.07

"COUNT II

"It is true that on January 15, 1964, the above named licensees at the above designated licensed premises did sell distilled spirits at retail to Special Investigator J. Derenzo of the Department of Alcoholic Beverage Control at a price less than the stipulated minimum price provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, as follows:

"Item	Lawful Minimum Retail Price	Price Paid	Difference
Two (2) 4/5 qts. Ancient Age Straight Bourbon Whiskey, 86 proof	$ 4.99 ea. $ 9.98	$ 3.50 ea. $ 7.00	$1.49 ea. $2.98
One (1) 4/5 qt. Gilbey's Gin, 90 proof	4.19	3.25	.94
	$14.17	$10.25	$3.92
4% Sales Tax	.57	–0–	.57
Total	$14.74	$10.25	$4.49

"COUNT III

"It is true that on January 31, 1964, the above named licensees at the above designated licensed premises did sell distilled spirits at retail to Special Investigator J. Robinson of the Department of Alcoholic Beverage Control at a price less than

the stipulated minimum price provided for in the Minimum Retail Price Schedule duly filed with the Department of Alcoholic Beverage Control, as follows:

"Item	Lawful Minimum Retail Price	Price Paid	Difference
Two (2) 4/5 qts. Ancient Age Straight Bourbon Whiskey, 86 proof	$ 4.99 ea. $ 9.98	$ 3.50 ea. $ 7.00	$1.49 ea. $2.98
One (1) 4/5 qt. Calvert Gin, 90 proof	3.99	3.25	.74
	$13.97	$10.25	$3.72
4% Sales Tax	.56	-0-	.56
Total	$14.53	$10.25	$4.28

"FINDINGS OF FACT ON AFFIRMATIVE DEFENSE:

"It is not true that the minimum retail prices alleged in the Accusation were fixed by or pursuant to any agreement, combination or conspiracy between the manufacturers or brand owners of the distilled spirits subject of the Accusation and other distilled spirits.

"LICENSEES' PREVIOUS RECORD:

"Licensed at the above location since 1959. Accusation filed 7/10/61 for viol. Sec. 24755, Rule 99 (f) (Fair Trade), Reg. 16014; Order of Revocation now before Superior Court; Accusation filed 11/27/61 for violation of Fair Trade, Reg. 16991. Order of Revocation now before Supr. Court. Also licensed at 717 El Camino Real, Redwood City, 4/26/60 to 5/23/63. Accusation filed for violation of Fair Trade, Reg. 16013; 30 days,

15 stayed on condition of transfer; all stayed when license transferred.

"DETERMINATION OF ISSUES PRESENTED:

"The Accusation states facts sufficient to constitute a cause of action for violation of the Alcoholic Beverage Control Act and the Rules and Regulations of the Administrative Code.

"Neither Section 24755 of the Business and Professions Code nor Rule 99, Title 4, of the California Administrative Code is unconstitutional or invalid for any of the reasons set forth in paragraph III of the respondents' 'Notice of Defense' on file herein, reference to which is hereby made, or otherwise.

"Neither Section 24755 of the Business and Professions Code nor Rule 99 of Title 4 of the California Administrative Code violate Article XX, Section 22, of the Constitution of the State of California, nor the due-process clauses of the Fifth or Fourteenth Amendments to the Constitution of the United States, nor Article I, Section 13, of the Constitution of the State of California.

"Neither Section 24755 of the Business and Professions Code nor Rule 99, of Title 4, of the California Administrative Code authorize or constitute a restraint of trade or commerce in violation of the Sherman Anti-Trust Act, nor Article XX, Section 22, of the Constitution of the State of California, nor the Cartwright Act.

"The said minimum price schedules and the filings thereof were valid and effective to establish the minimum resale prices of the distilled

spirits at the time of sale thereof, and complied with Section 24755 of the Business and Professions Code.

"By reason of the foregoing facts found to be true, grounds for the suspension or revocation of such license exist and the continuance of such license would be contrary to public welfare and morals, as set forth in Article XX, Section 22, State Constitution, and Section 24200 (a), Business and Professions Code. Additional grounds for suspension or revocation under Section 24200 (b), Business and Professions Code, exist in that respondents have violated Business and Professions Code, Section 24755 and Title IV, California Administrative Code, Rule 99 (f), as found under each of Counts I, II, and III."

The department in its determination of issues presented responds to the special defense asserted by appellants subsequent to receipt of the department's accusation. A special defense was directed to the purported invalidity of the fair trade provisions of the Alcoholic Beverage Control Act.

There is no need to here discuss evidence supportive of the sales set forth in the department's decision. There is no dispute as to these transactions. We do, however, feel constrained to mention that here the sales in question were so openly made (at the purported "illegal" prices) that the licensees may be considered as being only one step removed from openly advertising the sale of alcoholic beverages at prices below the minimum price schedule.

In the instant matter there is one question which causes us concern. Appellants in their appeal contend: "That the price schedules sought to be enforced were not published as required by law."

Section 24755 (b) of the Alcoholic Beverage Control Act requires the filing of a minimum retail price schedule with the department and publication of said price schedule ". . . in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule . . ." Subsection (e) of section 24755 provides:

> "No offsale licensee shall sell any package of distilled spirits at any price *less than the effective filed price* of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division." (Emphasis added.)

It is our interpretation of these sections that in order for there to be an "effective filed price" for the beverage involved, the record must show compliance with the mandatory provisions of section 24755 (b) as to filing with the department and publication in the manner prescribed. The offense is not that of selling below the minimum filed price, but rather of selling, in the language of the statute itself, below the "effective filed price." And to be "effective," the price must be not only filed but also published as required by law.

At the time of the department hearing, it was stipulated:

"Mr. Lampe: He testified——

"Mr. Bourquin: ——on April the 17, in a proceeding against the licensee Carella, register number 2423. And he testified fully; both sides examined him. And so I would be happy to stipulate with you, if he were called today he would testify to the same effect.

"The Hearing Officer: And we can incorporate his testimony by reference, is that right?

"Mr. Bourquin: Yes.

"Mr. Lampe: That would be satisfactory . . ." (R.T. 9:4-13.)

In the hearing in the matter of the accusation against Michael A. Carella and Pasquale J. Maniscalco, doing business as Carella's Pharmacy, AB-2185, File No. 60850; Reg. No. 2423, Mr. Page's testimony starts on page 3 and ends on page 16. With respect to the question of publication, Mr. Page's pertinent testimony appears to be the following:

"Q. Mr. Page, how long have you been publishing the Beverage Industry News?

"A. Since 1935.

"Q. And what area does this Beverage Industry News publication cover?

"A. Well, there are two. There is a newspaper which covers all of the State of California, and there is a separate price book which covers the Northern California trading area.

"Q. That is known as the Coast Division?

"A. Yes, Coast and Valley.

"Q. And how often is this published?

"A. On the first of each month.

"Q. To whom is this publication distributed?

"A. To the alcoholic beverage licensees in the State.

"Q. Is that on record with the Department?

"A. Yes.

"Q. And are records kept to whom the publications are sent?

"A. Yes, sir.

"Q. You have access to those records?

"A. Yes."

* * *

"Q. Now, then, the book—you said the book in this case—you said copy of this book was mailed to the Licensee here in November, the Price Book for November,——

"A. Yes.

"Q. ——1963? Is it mailed to Licensees? Was is mailed to all retail off-sale licensees then in November of 1963?

"A. Well, I couldn't swear to it, but it should have been. It was mailed in the same manner each time and I see no reason why it shouldn't have."

* * *

"Q. What do you charge the licensee to furnish him monthly with a copy of the Beverage Industry News?

"A. Now it is $7.50 a year.

"Q. It is $7.50 a year. Do all of the off-sale retail licensees subscribe to that book?

"A. Well, I don't believe all of them do.

"Q. Do you know how many? What fractions do and what fractions do not?

"A. Not off-hand; no.

"Q. Do you mail it to all whether they subscribe or not?

"A. Yes.

"Q. What is the source of your statement there? What is your information on that?

"A. What?

"Q. You don't do it personally. What do you base that statement on that you mail it to all whether they subscribe or not?

"A. Oh, we get the list of license holders from a firm who makes it their business to sell lists of all types, and we know that they have all of the licensees listed, and we get it and make up our own list by areas and mail it to them.

"Q. What firm do you get that list from, please?

"A. That's the—let's see: what is the name? Business Extension Bureau.

"Q. That is a private enterprise?

"A. Yes."

* * *

"Mr. Bourquin: Well, I think it has—the witness has made the statement that they mailed all of the retailers that he gets a list from this private concern—they mail to all. Those who subscribe pay seven and a half a month, and those who don't don't pay anything.

"Mr. Lampe: Well, it isn't an issue in the case.

"Mr. Bourquin: It shows the influence where the publication was taken and it shows how wholly independent it is of any official character.

"The Hearing Officer: Well, it is a possibility that those who don't pay don't get it."

(R.T. 3:24-30; 4:1-13; 11:18-26; 11:30; 12:1-25; 15:9-19.)

In our opinion, it would have been far better to have had direct testimony on the issue of publication.

Under the stipulation, we have Mr. Page testifying that the publication is distributed "to the alcoholic beverage licensees in the State." (AB-2185; R.T. 4:7); that he did not believe that all of the off-sale retail licensees subscribe to the publication (R.T. 12:5); that they mailed the publication to all of the licensees whether they subscribe or not (R.T. 12:10); that possibly 25 per cent of the licensees are non-subscribers; that 25 per cent of the licensees may be delinquent at one time, but that 100 per cent of the licensees at one time or another have paid (R.T. 16); and that they get the list of licensed holders from a firm who makes it their business to sell lists of all types (R.T. 12:17). In answer to a question as to whether the price book was mailed to all retail off-sale licensees in November, 1963, Mr. Page replied:

> "Well, I couldn't swear to it, but it should have been. It was mailed in the same manner each time and I see no reason why it shouldn't have." (R.T. 11:24-26.)

Section 24755 of the Alcoholic Beverage Control Act is clear in its requirement that publication ". . . shall . . . be . . . in a manner which will result in each retailer affected . . . being advised . . ." Since to be "effective" the schedule must be published in accordance with the provisions of this section, the record must contain substantial evidence in compliance therewith. In our opinion, the record in this case does not establish publication as required by the statute and so the evidence does not support the department's finding

that appellants sold at a price below the minimum retail price schedule duly filed.

In view of the foregoing, the decision of the department in the present proceeding must be reversed.

/s/ Robert H. Haden
Robert H. Haden, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Arthur W. Belcher
Leverette D. House
Sacramento, California
January 19, 1965

Served on all parties by certified mail
Aug 24 1965

Before the Alcoholic Beverage Control Appeals Board
of the State of California

In the Matter of the Accusation
against
Charles Cohon and Irving Sirbu,
dba Alhambra Drug Store,
2300 Polk Street,
San Francisco, California,
Respondents and Licensees,
under the Alcoholic Beverage
Control Act.

AB-2324
File No. 19309; Reg. No. 2729
Time & Place of Hearing:
July 8, 1965, @ 10 a.m.
World Trade Center
San Francisco, California
For Department:
Honorable Thomas Lynch
Attorney General
L. Stephen Porter
Deputy Attorney General
For Appellants:
M. Mitchell Bourquin, Esq.
(No appearance at oral
argument.)

Appellants operate a drug store and in connection therewith exercise the privilege of selling alcoholic

beverages "off sale" under the auspices of the off-sale general license issued to them by the Department of Alcoholic Beverage Control. The present proceeding was commenced against them by the filing of an accusation by the department on January 22, 1964, accusing appellants of having violated the minimum price provisions of the Alcoholic Beverage Control Act and related rules of the department. In due course a hearing was held on this accusation and a decision was adopted by the department determining, in two counts, that appellants, in fact, had sold certain alcoholic beverages "at prices less than the stipulated minimum prices provided for in Minimum Retail Price Schedules duly filed with the Department of Alcoholic Beverage Control." It was appellants' contention before the department, and it is their contention on appeal, that the minimum price provisions of the Alcoholic Beverage Control Act are unconstitutional and invalid, as are the department rules adopted pursuant thereto, and that the evidence is insufficient to support the findings in that there is no substantial evidence that the price schedules were not published in accordance with the requirements of the statute. Because of the insufficiency of the evidence to support the findings, it is unnecessary to consider the constitutional question. We shall, therefore, address ourselves to the question of the sufficiency of the evidence in relation to publication of the price schedules.

We have, in several recent decisions (AB-2089, Appeal of Cohon and Sirbu; AB-2181, Appeal of Carella; AB-2185, Appeal of Carella and Maniscalco; and AB-2258, Appeal of Dorian and Matoff, held that the man-

date of section 24755 requires the filing of a minimum retail price schedule with the department and publication of said price schedule "in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule." It is our interpretation of these sections that in order for there to be an "effective filed price" for the beverage involved, the record must show compliance with the mandatory provisions of section 24755(b) as to the filing with the department and publication in the manner prescribed. The offense is not that of selling below the minimum filed price, but, rather, of selling, in the language of the statute itself, below the "*effective* filed price" (emphasis added) and to be effective, the price must not only be filed but also published as required by law. If all that was required was the simple filing of the price schedule with the department, there would have been no need for the Legislature to require publication in the manner indicated and to also insert the adjective "effective" in subsection (e) of section 24755.

The evidence of publication in this case consists of the testimony of the publisher of "Beverage Industry News," Leroy W. Page. He testified:

> "Q. Now, to whom was this publication distributed?
>
> "A. To all the distilled spirits licensees in the Northern California Trading Area."
>
> (R.T. 2:16-18.)

On cross examination into the method of mailing, Mr. Page testified as follows:

"Q. Now, you also stated that when they subscribed originally, do you receive notifications from these licensees requesting a subscription?

"A. In some cases.

"Q. And the others, how do you ordinarily obtain the licensees that are in California, the alcoholic beverage licensees?

"A. Well, the new ones we get from Sacramento.

"Q. Over a period of years do you recall how you receive this notification? Was this sent from the Department each time a person was licensed to you?

"A. Yes, we buy that list, actually, from a mailing firm whose business it is to have that list up to date; and it would cost us more money to try and get it individually than through him since he's not only getting it for us, he's getting his list up that he sells to many other people. So we can do it cheaper through him than we could by going to Sacramento personally and getting it.

"Q. You rely on that list?

"A. Yes, for the new ones.

"Q. Pardon?

"A. For the new ones.

"Q. But unless there's any changes——

"A. Yes."

* * *

"Q. Mr. Page, who is that mailing firm that you say you buy the list of licensees from?

"A. I can't think of the name of it. The name escapes me. They have been in business for a long, long time but we don't do business with them constantly. It's just when they get these they send them to the office.

"Q. You mean they drop you a note each new licensee?

"A. Yes, they send it on a regular form that they have.

"Q. Of each new one even if it just be one?

"A. Each new one and each change.

"Q. This is a private concern?

"A. Yes.

"Q. And you say you rely on that one for the new ones and——

"A. Yes.

"Q And you mean the new ones, those over how many few years?

"A. Well, whenever a person gets a license as a new license or if it's purchased from somebody else and the name changes.

"Q. In other words, you rely on them to keep your list up to date?

"A. Yes.

"Q. Now, how long have you been doing business with that private mailing firm?

"A. Oh, a number of years.

"Q. How many would you say?

"A. Oh, possibly ten.

"Q. What did you do before that, what was your source of the licensees?

"A. Well, we were doing business with another one, but it's the same idea exactly."

(R.T. 19:7-29; 21:9-30; 22:1-6.)

Section 24755 is clear in its requirement that publication "shall . . . be . . . in a manner which will result in each retailer affected." Since to be "effective" the schedule must be published in accordance with the provisions of this section, the record must contain substantial evidence of compliance thereto. To the extent that rule 99(k) of the department is inconsistent

with Business and Professions Code section 24755, in our opinion the record in this case does not establish publication as required by the statute. The testimony of Mr. Page is that a list is obtained from a private company, said list purporting to contain the names of licensees of the Department of Alcoholic Beverage Control. This list is provided to a mailing service which prepares address-o-graph plates and mails a copy of the "Beverage Industry News" to each name appearing on this list. It is obvious that Mr. Page has no personal knowledge that the names on the list are actual licensees of the department or that the list is complete. His testimony cannot be considered as substantial evidence in support of the finding that the price schedules here involved were published in accordance with the provisions of the statute.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby reversed.

Leverette D. House, Chairman
Alcoholic Beverage Control
Appeals Board

We Concur:
Leon M. Cooper
Roger P. Garety
Sacramento, California
August 19, 1965

Appendix C

California Business and Professions Code

§ 24755. Minimum retail price schedule; filing; amendments; loss leader sales; rejection of noncomplying schedules; exempt sales. (a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of Southern California and the trading area of Northern California. The trading area of Southern California shall consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The Northern California trading area shall consist of the other counties of the State. No more than one person shall file a schedule for the same package for the same trading area. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer

affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

No retailer shall sell any package of distilled spirits as a loss leader. "Loss leader," as used in this section,

means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

The department shall reject any price schedule which does not comply with this subdivision.

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(f) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has been in this State, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule

under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a closeout sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(g) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stats. 1961, c. 635, p. 1835, § 4.)

Appendix D

99. Minimum Retail Price Schedules. (a) **Posting of Minimum Retail Price Required.** No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) **Brand Defined.** The word "brand" as used herein means "brand, trade mark, label or name", and if an additional secondary name or a different form of label is used, each will be considered to be a separate brand.

(c) **Distilled Spirits Item Defined.** "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of distilled spirits including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight

Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved.

(d) **Distilled Spirits Sold "On-Sale" Only.** If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) **Who Files Minimum Retail Price Schedules.**

Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesaler or importer authorized by an out-of-State

or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) **Price Schedule Sheets to be Filed.** Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department, 1215 O Street, P.O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office for inspection. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC 705" in the lower left-hand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4) and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size

or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minimum retail case prices covering all case sizes must be shown on the price schedules for each size and type.

(g) **Filing Dates; New Item.** A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month, provided, however, the price of such new item is published on or before the aforesaid effective date.

(h). **Change of Minimum Retail Price on File.** A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

(i) **Change in Price of an Item to Meet Price of Competitive Brand.** A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month; provided, however, such price change is published on or before the aforesaid effective date.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits means one identical as to categories (1) and (5) in the definition of "Distilled Spirits Item" in (c) above; the price change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) **Filing Date Exception.** Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business the next business day.

(k) **Publication.** The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and of every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, rectifier or wholesaler, and any amend-

ments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

(l) **Deliveries.** No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been filed with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

(m) **Withdrawal of Item from Price Schedule.** No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(n) **Transfer of Price Filing Obligation.** When, for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

(o) **Tax Increase or Government Order.** Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(p) **Sales as Loss Leaders Prohibited.** All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

NOTE: Authority cited for amendment filed 10-2-56: Sections 24757 and 25750, Business and Professions Code; Section 22, Article XX, California Constitution. Issuing agency: Department of Alcoholic Beverage Control. Additional authority cited: Sections 24749, 24750, 24751, 24752, 24755 and 25752, Business and Professions Code.

History: 1. Repealer and new section filed 9-12-61; designated effective 10-15-61 (Register 61, No. 18). For prior history, see Register 60, No. 16.

PREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. [redacted] 57

CHARLES COHON, IRVING SIRBU, JACK DORIAN, WALTER MATOFF, CATHERINE CARELLA, MICHAEL CARELLA and PASQUALE MANISCALCO,

Appellants,

vs.

JAMES O. REIMEL, Director of the Department of Alcoholic Beverage Control of the State of California,

Appellee.

Motion to Dismiss Appeal for Want of a Substantial Federal Question

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1318

CHARLES COHON, IRVING SIRBU, JACK DORIAN, WALTER MATOFF, CATHERINE CARELLA, MICHAEL CARELLA and PASQUALE MANISCALCO,

Appellants,

vs.

JAMES O. REIMEL, Director of the Department of Alcoholic Beverage Control of the State of California,

Appellee.

Motion to Dismiss Appeal for Want of a Substantial Federal Question

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed on the ground that it does not present a substantial federal question.

OPINION BELOW

The opinion of the California Court of Appeal, First Appellate District, Division One, (hearing by the California Supreme Court denied, January 17, 1968) is reported in 256 Advance California Appellate Reports 188 and 784, 64 Cal.Rptr. 171 (1967).

STATUTES INVOLVED

The principal statutes concerned herein are sections 24749 through 24757 of the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code, Div. 9) attached hereto as Appendix A, and section 99 of Title 4 of the California Administrative Code attached hereto as Appendix B. These statutes involve California's *mandatory* minimum retail price maintenance system for liquor sold at retail in California.

QUESTIONS PRESENTED

Appellants' Jurisdictional Statement alleges that the aforesaid California statutes violate:

(1) the anti-trust laws of the United States in that a 1961 amendment to the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor allegedly eliminated any requirement of "fair and open competition" (Appellants' Jurisdictional Statement, pp. 4-5), and

(2) the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment in that the statutes unreasonably discriminate in favor of the liquor industry over other industries for no legitimate purpose and allow for two different trading areas within the State of California (Appellants' Jurisdictional Statement, p. 5)

Appellee respectfully submits that such contentions are erroneous and that no substantial federal question is presented in this appeal.

STATEMENT OF THE CASE

These consolidated state court cases involve the State of California's regulation and control of the retail sale of liquor in California under the Twenty-first Amendment to the United States Constitution, under Article XX, Section 22 of the California Constitution and under the California Alcoholic Beverage Control Act (Calif. Bus. & Prof. Code, Div. 9 §§ 23000 to 25762).

The cases deal specifically with the California Alcoholic Beverage Control Act's *mandatory* minimum retail price maintenance system for the retail sale of liquor in California. This very same type of alcoholic beverage control system has already been before this Honorable Court in *Schwartz v. Kelly,* 140 Conn. 176, 99 A.2d 89 (1953), and this Court dismissed the appeal therein for want of a substantial federal question, 346 U.S. 891.

The main thrust of these cases in the California Court of Appeal involved a *state issue* as to what constituted proper publication of the minimum retail prices under former section 24755(b) of the California Alcoholic Beverage Control Act. In addition, the violating licensees (appellants herein) also made an attack on the validity of section 24755 of the California Alcoholic Beverage Control Act, as amended in 1961, on the grounds that it allegedly involved an unlawful delegation of legislative power and that it allegedly eliminated any requirement of fair and open competition.

While the appellants raised various possible federal questions in their respective proceedings before the California Department of Alcoholic Beverage Control and the Califor-

nia Alcoholic Beverage Control Appeals Board, we would note that all of the California Alcoholic Beverage Control Appeals Board's decisions rest solely upon the *state issue* regarding what constitutes proper publication of the minimum retail prices under the provisions of former section 24755(b) of the California Alcoholic Beverage Control Act.

As shown by the respective California Superior Court clerk's transcripts, not one of these appellants raised, urged or attempted to litigate in the California superior court the validity of the statutes involved herein on either state or federal grounds. The pleadings in and judgments of the California superior court clearly demonstrate that each of these cases in the superior court involved only the singular *state issue* regarding publication of the prices.

Only when the cases reached the California Court of Appeal, and following the filing of the California Department of Alcoholic Beverage Control's opening briefs dealing with the singular *state issue* concerning the publication of the prices, did the appellants raise for the first time in the California courts the validity of the statutes involved herein.

In the California Court of Appeal appellants challenged the validity of the statutes on the ground that the statutes allegedly violated due process under the California Constitution in that the statutes allegedly provided for an unlawful delegation of legislative power, and on the ground that the statutes allegedly violated the California Cartwright Act (Calif. Anti-Trust Act) because of an alleged elimination of fair and open competition. These appellants did not raise any issue with respect to the statutes establishing two trading areas in California.

ARGUMENT

I. Both Traditionally and Under the Twenty-First Amendment, a State Has Broad Regulatory Powers Over Alcoholic Beverages Destined for Use, Distribution or Consumption Within Its Borders

Both traditionally[1] and under the Twenty-first Amendment[2] the power of a state to regulate and control alcoholic beverages destined for use, distribution or consumption within its borders—including complete prohibition as well as any restriction falling short of prohibition even if discriminatory in nature—has been unconditional.

Except for cases involving: (a) foreign commerce[3], (b) import-export[4], (c) interstate commerce in transit through the regulating state[5], (d) federal enclaves[6], and (e) possible

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1. Mugler v. Kansas, 123 U.S. 623, 657-671 (1887); Crowley v. Christensen, 137 U.S. 86, 91 (1890); Giozza v. Tiernan, 148 U.S. 657, 661-662 (1893); Cronin v. Adams, 192 U.S. 108, 114-115 (1904); Cox v. Texas, 202 U.S. 446, 451 (1906); Purity Extract Co. v. Lynch, 226 U.S. 192, 201 (1912); Seaboard Air Line Ry. v. North Carolina, 245 U.S. 298 (1917); Crane v. Campbell, 245 U.S. 304, 307 (1917); McCormick & Co. v. Brown, 286 U.S. 131, 140-141 (1932).

2. State Board of Equalization v. Young's Market, 299 U.S. 58, 63-64 (1936); Mahoney v. Triner Corp., 304 U.S. 401 (1938); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939); Indianapolis Brewing Co. v. Liquor Commission, 305 U.S. 391, 394 (1939); Ziffrin v. Reeves, 308 U.S. 132, 138 (1939); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945).

3. U.S. Const. Art. I, § 8, cl. 3; Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Department of Alcoholic Beverage Control v. Ammex Warehouse Co., 378 U.S. 124 (1964).

4. U.S. Const. Art. I, § 10, cl. 2; Department of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964); Low v. Austin, 13 Wall. 29 (1871); and see Parrott & Co. v. San Francisco, 131 Cal.App.2d 332, 280 P.2d 881 (1955).

5. Duckworth v. Arkansas, 314 U.S. 390 (1941); Carter v. Virginia, 321 U.S. 131 (1944); Gordon v. Texas, 355 U.S. 369 (1958).

6. Collins v. Yosemite Park Co., 304 U.S. 518 (1938).

intolerable burdens on interstate commerce *outside* of the regulating state[7], this Honorable Court has consistently denied certiorari or dismissed appeals for want of a substantial federal question in cases involving state regulation and control of alcoholic beverages destined for use, distribution or consumption within the state's borders.[8]

As but recently set forth by this Honorable Court in *Seagram v. Hostetter,* 384 U. S. 35 at 41-43 (1966):

> "... The appellants attack #9 on many constitutional fronts. They contend that its provisions place an illegal burden upon interstate commerce, conflict with federal antitrust legislation and thus fall under the Supremacy Clause, and violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. We find all these contentions without merit.
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> "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: 'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.' As this Court has consistently held, 'That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.' (Citations) Just two terms ago we took occasion to reiterate that 'a State is totally unconfined by traditional Commerce Clause limitations

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7. Seagram & Sons v. Hostetter, 384 U.S. 35 (1966). Cf. United States v. Frankfort Distilleries, 324 U.S. 293, 299 (1945).

8. Schwartz v. Kelly, 346 U.S. 891 (1953), appeal dismissed for want of a substantial federal question; California v. Washington, 358 U.S. 64 (1958), motion to file complaint denied; Hooper v. Duncan, 379 U.S. 27 (1964), appeal dismissed for want of a substantial federal question; Plaza Liquor Stores, Inc. v. City of Atlanta, 381 U.S. 914 (1965), cert. denied; Laird & Co. v. Cheney, 385 U.S. 371 (1966), appeal dismissed for want of a substantial federal question; Inman v. City of Miami, 389 U.S. 1048 (1968), cert. denied.

when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.' (Citations)

"... the present case concerns liquor destined for use, distribution or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause. (Citation) No such situation is presented in this case. The mere fact that #9 is geared to appellants' pricing policies in other States is not sufficient to invalidate the statute." (footnote omitted)

In *Indianapolis Brewing Co. v. Liquor Commission,* 305 U.S. 391, 394 (1939), this Court held that state alcoholic beverage control laws, even though discriminatory in nature, could not be considered as in violation of the due process clause of the Fourteenth Amendment. And to the same point see *Mahoney v. Triner Corp.,* 304 U.S. 401 (1938) and *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939).

In the recent case of *California v. Washington,* 358 U.S. 64 (1958), wherein the State of California sought to prevent the State of Washington from imposing discriminatory regulations on California wines being marketed in the State of Washington, this Court *refused* to hear the case, citing in its per curiam opinion: U.S. Constitution, Amend. XXI, §2; *Indianapolis Brewing Co. v. Liquor Commission,* supra; *Joseph S. Finch & Co. v. McKittrick,* 305 U.S. 395; *Mahoney v. Joseph Triner Corp.,* supra; and *State Board of Equalization v. Young's Market,* 299 U.S. 59.

Perhaps the most striking expression of the dominant role played by the Twenty-first Amendment with respect

to state regulation of alcoholic beverages is that found in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59, 63-64 (1936):

> ". . . A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."

Since possession and sale of alcoholic beverages are not inherent rights of citizenship nor proprietary rights[9], and inasmuch as the Twenty-first Amendment constitutionally separates alcoholic beverages apart from all other commodities, this Court has held that the due process and equal protection clauses of the Fifth and Fourteenth Amendments are not controlling with respect to a state's regulation of alcoholic beverages within the state's borders[10].

And with respect to the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance requirements for liquor to be sold at retail in California, this Honorable Court has clearly set forth that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders"[11].

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9. Crowley v. Christensen, 137 U.S. 86, 91 (1890); Crane v. Campbell, 245 U.S. 304, 308 (1917).

10. U.S. Const., 21st Amendment; California v. Washington, 358 U.S. 64 (1958), and the authorities cited in footnotes 1 & 2, supra.

11. Seagram v. Hostetter, 384 U.S. 35, 42 (1966); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964); Department of Revenue v. James Beam Distilling Co., 377 U.S. 341, 344 (1964); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 301 (1945); and see Washington Brewers Institute v. United States, 137 F.2d 964 (1943), cert. denied 320 U.S. 776; Schwartz v. Kelly, 99 A.2d 89 (1953), cert. denied 346 U.S. 891.

II. The California Alcoholic Beverage Control Act's Mandatory Minimum Retail Price Maintenance System Regulates the Retail Sale of Liquor Within the Borders of California and Provides for Orderly Marketing Conditions and the Promotion of Temperance in Connection Therewith

As part of its overall statutory scheme for the regulation and control of alcoholic beverages destined for use, distribution or consumption within its borders, California has for nearly thirty (30) years (1939-1968) prescribed a *mandatory* minimum retail price maintenance system for the retail sale of liquor in California[12].

The purpose and function of the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor[13]—the promotion of both orderly marketing conditions and temperance in the retail sale of liquor in California by the elimination of price wars and cut-rate sales—is set forth at length in the California Supreme Court's recent reaffirmation[14] of the validity of said laws in *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control,* 65 Cal.2d 349 (Dec. 1966), 420 P.2d 735, wherein the California Supreme Court comprehensively dealt with and rejected the very same argu-

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12. § 99, Title IV, Calif. Admin. Code and Rule 42, Calif. State Board of Equalization (1939-1947); §§ 55.6 and 24749 through 24881, California Alcoholic Beverage Control Act (Div. 9, Calif. Bus. & Prof. Code) (1947-1968).

13. The California Alcoholic Beverage Control Act's *mandatory* minimum retail price maintenance law for liquor (§§ 24749 to 24757, Calif. Bus. & Prof. Code) is to be distinguished from California's *permissive* general fair trade law for ordinary commodities (§§ 16900 to 16905, Calif. Bus. & Prof. Code).

14. See the California Supreme Court's earlier decision upholding the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor: Allied Properties v. Department of Alcoholic Beverage Control, 53 Cal. 2d 141 (1959), 346 P.2d 737.

ments which these appellants are now attempting to advance in their jurisdictional statement herein.

As set forth by the California Supreme Court in *Wilke & Holzheiser Inc. v. Department of Alcoholic Beverage Contral,* supra, 420 P.2d 735 at 742-748. (most footnotes omitted):

> "Plaintiff first contends that these provisions are unconstitutional because they exceed the police power of the state. In passing upon the validity of that contention, we exercise an extraordinary power over a coordinate branch of government and perform a correspondingly narrow function: we simply determine whether the statute reasonably relates to a legitimate governmental purpose. In so doing, we find the requisite relationship in the absence of an unquestionable contrary showing. (Los Angeles Met. Transit Authority v. Public Util. Com. (1963) 59 Cal.2d 863, 867; Wholesale T. Dealers v. National etc. Co. (1938) 11 Cal.2d 634, 646.) We must not confuse reasonableness in this context with wisdom. ' "The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded . . ." Ferguson v. Skrupa, 372 U.S. 726, 728-730.' (Seagram & Sons v. Hostetter (1966) 384 U.S. 35, 47.)
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> To incant these precepts in form and ignore them in substance is to disregard the most basic postulates of representative government; yet, as one court has observed, 'the courts of last resort that have rejected fair trade acts on Constitutional grounds seem to have . . . done so because of an unwillingness to accept the legislative judgment as to the economic facts.' (Home Utilities Co. v. Revere, supra, 209 Md. 610, 617.) On such debatable matters the Legislature properly serves as the court of last resort. When, as in this case, 'appeal is made to liberties which derive merely from shifting economic arrangements' (Kovacs v. Cooper

(1949) 336 U.S. 77, 95 (Frankfurter, J., concurring)), the judgment of the Legislature reaches this tribunal with a momentum for respect lacking when the Legislature tampers with 'those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society.' *(Ibid.)* With these admonitions in mind, we turn to plaintiff's contention that the retail price maintenance provisions of the Alcoholic Beverage Control Act bear no reasonable relation to any legitimate governmental purpose.

The Legislature adopted the Alcoholic Beverage Control Act 'for the protection of the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages.' (Bus. & Prof. Code, § 23001.) With regard to the retail price maintenance provisions specifically, the Legislature made its purpose plain: 'It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages . . . for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination.' (Bus. & Prof. Code, § 24749.)

The promotion of temperance in the consumption of alcoholic beverages and of orderly conditions in their marketing clearly constitute proper legislative objectives. The declared purposes of the Alcoholic Beverage Control Act in general and of its retail price mainte-

nance provisions in particular are therefore entirely legitimate, and we must sustain the price maintenance provisions if they bear a reasonable relationship to any of those purposes.

We turn first to the purpose of promoting temperance. The retail price maintenance provisions proceed on the assumption that 'the elimination at the retail level of price cutting, bargain sales, and advertising of low prices tends to reduce excessive purchases of alcoholic beverages.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 148.) We cannot call such an assumption irrational. In upholding the validity of a state statute limiting retail liquor licenses to two per person, the New Jersey Supreme Court held that in formulating its policy the Legislature could properly accept 'widely held views as to sound liquor control,' including the 'beliefs that the consumption of liquor is elastic rather than inelastic, [and] that price cuttings and their advertisement, along with comparable practices, are undesirable in the liquor field as tending to stimulate consumption. . . .' (Grand Union Co. v. Sills (N.J. 1964) 204 A.2d 853, 859.)

Our Legislature may have sought to prevent the special inducement to purchase liquor which results from loss leaders, price-cutting, and bargain sales at the retail level. (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 148-149.) That the Legislature did not also seek to prevent intemperance by limiting the volume of liquor sales, by regulating competition among producers and wholesalers, or by establishing high liquor prices generally, creates no constitutional infirmity. As we said in Board of Education v. Watson (1966) 63 Cal.2d 829, 833, 'The Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free to recognize degrees of harm and to confine its regulation to those

classes of cases in which the need is deemed to be the most evident.'

The selectivity of our Legislature's approach to the problem of intemperance might reflect a variety of entirely legitimate considerations. Thus the Legislature could have reasoned that some people might respond more impulsively to bargain sales of their preferred brand than to bargains offered by competing brands. Or the Legislature might have concluded that unregulated competition among the relatively few liquor producers and wholesalers would not unduly stimulate liquor consumption but that similar competition among the large number of retailers, who come into direct contact with consumers and who are more vulnerable to economic pressure, would stimulate selling practices calculated to induce intemperance. We cannot say that all of these suppositions would have been 'palpably arbitrary and beyond rational doubt erroneous.' (In re De La O (1963) 59 Cal.2d 128, 153; State of California v. Ind. Acc. Com. (1957) 48 Cal.2d 365, 371.)

Plaintiff calls our attention to the fact that the New York Moreland Commission (see New York State Legislative Annual (1964) 401-408, 484-489, 498-500) found that mandatory retail price maintenance did not significantly reduce the consumption of alcoholic beverages. We note, however, that the response to the Moreland Commission Report in New York came from the Legislature (Session Laws of New York, 1964, ch. 531, § 11), not the courts. Legislative revision of a statute cannot be equated to its death knell by judicial decree.

We turn to the second legislative purpose: the promotion of the orderly sale and distribution of alcoholic beverages. Retail price wars among liquor distributors may encourage retailers, struggling to withstand the pressure of ruinous competition, to sell liquor below cost in violation of Business and Professions Code section 17043 or to transgress the regulatory laws governing retail liquor distribution (Bus. & Prof. Code,

§§ 25600-25666).[9] To the extent that the retail price maintenance provisions eliminate retail price wars in the liquor industry, they undeniably discourage such disruptive practices.

The Legislature may likewise have concluded that giant retailers and chain markets should be afforded no opportunity to use loss leaders in branded liquor to attract customers in disregard of Business and Professions Code section 17044 and thus ultimately to force smaller retailers out of business. Such tactics, the Legislature may have thought, would disrupt orderly distribution by endangering the continued vitality of one method of marketing: the corner grocery store. The Legislature may have decided not to expose these channels of distribution to possible economic destruction through manipulation, by powerful competitors, of so highly volatile and attractive a product as branded liquor.

Plaintiff answers that the instant legislation reaches unnecessarily far in this respect because the kinds of marketing disruptions that we have described may be curtailed by present statutes. But, in the first place, even assuming that the Legislature did no more than fashion further means of proscribing previously prohibited practices (Bus. & Prof. Code, §§ 25600-25666; *Id.*, §§ 17000-17101), we see no ground for unconstitutionality in such duplication. The possibility that 'other less stringent . . . regulations might have sufficed is not our concern; that is a matter lying within the

9. As one court put it, 'The liquor industry is *sui generis*. If conditions of competition come about that threaten the economic existence of a vast number of small retailers, there exists a real threat that they may take illegal shortcuts to maintain their solvency, to the detriment of the industry and the harm of the public.' (Grand Union Co. v. Sills (N.J. 1963) 194 A.2d 591, 595, affd. Grand Union Co. v. Sills, supra, 204 A.2d 853. See also Schwartz v. Kelly, supra, 140 Conn. 176, 180; Supreme Malt Products Co., Inc. v. Alcoholic Beverage Control Commission, supra, 334 Mass. 59, 62.)

discretion of the legislative body.' (Nat. Milk etc. Assn. v. City etc. of S.F. (1942) 20 Cal.2d 101, 115.)[10]

In the second place, the Legislature may have intended more than the fortification of existing statutory regulations. It may have sought to fill the gap between price-cutting procedures pursued in practice and those proscribed by law. The Unfair Practices Act (Bus. & Prof. Code, §§ 17000-17101) does not offer a facile means for the prevention of all below cost and loss leader selling; the requirements of proof of such selling under the act are stringent and for this reason the act is rarely invoked. The Legislature could certainly have concluded that such legislation would be of small comfort and little aid to independent retailers in their struggle against large-scale price-cutting competitors.

Whatever dangers the Legislature thought implicit in disorderly marketing, we cannot question the wisdom of its concern. As we said in another context, 'Where the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant.' (City of Bakersfield v. Miller (1966) 64 A.C. 95, 102.)

Finally, plaintiff contends that the retail price maintenance provisions, even if reasonably related to either or both of their declared objectives, cannot be justified as an exercise of the police power because their 'real' purpose and effect is not to regulate the sale of alcoholic beverages in the public interest but to swell the profits of the liquor industry.

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10. The principle that even a legitimate governmental purpose 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved' (Shelton v. Tucker (1960) 364 U.S. 479, 488) has no application to a purely economic regulation, impinging in no significant way upon the dignity or freedom of the individual.

Insofar as plaintiff's contention focuses on the legislative *purpose,* it amounts to a suggestion that we should not take the Legislature at its word but should instead decide for ourselves, by a process which remains unexplained, what the Legislature 'really' intended to achieve by enacting the provisions in question. Although several courts have acceded to that suggestion, we do not believe that we are either authorized or equipped to undertake so ill-defined and hazardous an inquiry. '[T]his court may not presume that in reaching its decision [the Legislature] acted upon improper motives. ". . . a judiciary must judge by results, not by the varied factors which may have determined legislators' votes . . ." [citations].' (Werner v. Southern Cal. etc. Newspapers, supra, 35 Cal.2d 121, 129.) 'Nor can legislation be set aside by courts because of the fact, if it be such, that it has been sponsored and promoted by those who advantage from it [footnote omitted].' (Cohen v. Beneficial Loan Corp. (1949) 337 U.S. 541, 551.)

Insofar as plaintiff's contention focuses on the legislative *effect,* we cannot fail to recognize it as an invitation to hold the law invalid because we disagree with its desirability. As we have said, we cannot invalidate legislation merely because we do not approve of its potentially beneficient impact upon a particular segment of society.

At its base, the argument that the statute is unconstitutional because of its supposed bias in favor of the liquor industry rests upon a wholly unrealistic view of the legislative process. As our social and economic life grows in complexity, legislation necessarily increases in the differentiation of its techniques and in the specialization of its objectives. Thus the endeavor to achieve the general welfare of the whole through the special welfare of each part becomes ever more necessary. By protecting the interests of complaining constituents through legislation tailored to meet their

particular needs, the Legislature can seek to maximize the satisfaction of society as a whole. Surely courts should not inject themselves into this inherently pluralistic process of compromise by attempting to reserve to themselves a power to veto the balance struck because of a bare belief in its undesirability.

Plaintiff's second basic challenge to the constitutionality of the retail price maintenance provisions is that they unlawfully delegate legislative power by enabling each producer and wholesaler to set the price below which retailers may not sell his product. We rejected precisely that contention in Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 149-152, just as we rejected a similar contention in sustaining the general Fair Trade Act (Bus. & Prof. Code, §§ 16900-16905) against a challenge of unlawful delegation in Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 888. We see no reason to depart from those holdings.

To contend that the Alcoholic Beverage Control Act unlawfully delegates legislative power is to misconceive the nature of the power which is purportedly delegated. The power we analyze here finds expression in the private act of the producer in entering into a contract setting a price for the resale of his own brand. *Scovill* tells us that this act is not the performance of a legislative function and not the exercise of an unlawfully delegated power. Nor does plaintiff directly question *Scovill*. Yet, if the producer's contractual designation of a resale price binding on all retailers is not the exercise of an unlawfully delegated legislative power, the statutory *requirement* that he designate that price cannot transform his act into the exercise of such a power. The statutory requirement clearly confers no *power* on the producer that he would not have possessed without it.

Allied Properties makes this point abundantly clear. In describing the alleged delegation, the opinion in

Allied Properties states that 'the function performed by the persons who assertedly exercise delegated legislative powers is the same under the general Fair Trade Act and the Alcoholic Beverage Control Act.' (P. 149.) The opinion points out that the act of designating a resale price binding on all retailers is '"no more legislative in character than are other acts . . . of private parties undertaken as a prerequisite to the application of a statute."' (P. 149.)

To argue that the Alcoholic Beverage Control Act unlawfully delegates legislative power because it is a "price-fixing act" is to overlook the crucial distinction between the fixing of a price for *all* products in a given market and the setting by the producer of the retail price at which *his own* product is to be sold.[13] As *Allied Properties* explains (pp. 151-152), this distinction finds dramatic illustration in the difference between the instant legislation and the statute involved in State Board v. Thrift-D-Lux Cleaners (1953) 40 Cal.2d 436.

The court in *Thrift-D-Lux* declared unconstitutional a statute which delegated to the State Board of Dry Cleaners the power to fix minimum prices. (Bus. & Prof. Code, §§ 9560-9567, repealed by Stats. 1957, ch. 1691, § 11.) The statute entrusted the board with the power to decide, in terms of the public health and safety, which cities should have minimum price schedules, which services should be included in those sched-

13. The Alcoholic Beverage Control Act delegates to the producer no power which he could not in theory achieve unilaterally. The producer could, subject of course to the antitrust laws (see, e.g., Simpson v. Union Oil Co. (1964) 377 U.S. 13), maintain his own retail outlets or place his goods on consignment and thereby reserve full control over their retail price without the aid of price maintenance legislation of any kind. The infeasibility of such vertical integration in the liquor industry should not be permitted to obscure the fact that the Legislature has simply attempted to simulate some of the marketing conditions which would prevail if vertical integration were to take place.

ules, and what prices should be charged for the services. As *Allied Properties* points out, the court in *Thrift-D-Lux,* in holding the statute unconstitutional, 'relied on the ground that there was a delegation of legislative power without ascertainable standards to an administrative board composed mainly of members of the industry who would participate in fixing prices to be charged by their competitors . . . . On the other hand it was held in Scoville Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 887-888, that there was no delegation of legislative power where manufacturers, acting in their private capacity under the general Fair Trade Act, fixed the prices for which their own products were to be sold at retail by persons who were not their competitors. The distinguishing factor is that the dry cleaners' board was directed to fix uniform minimum prices for the services of all dry cleaners in limited areas on the basis of what is believed was required by public health and safety, whereas under the general Fair Trade Act each manufacturer is to fix retail prices for his own products in accord with his personal interest.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 151-152.)

When the power which the Legislature purports to confer is the power to regulate the business of one's competitors, as in *Thrift-D-Lux,* or the power to exclude potential competitors from an entire industry or occupation, as in Blumenthal v. Board of Medical Examiners (1962) 57 Cal.2d 228, 235-236, a real danger of abuse arises, and the courts accordingly insist upon stringent standards to contain and guide the exercise of the delegated power.

A similar insistence upon stringent standards would serve little if any purpose in the case of the Alcoholic Beverage Control Act. As we noted in *Allied Properties* (pp. 151-152), that act authorizes no individual or group to exercise either regulatory or exclusionary

power over any competitor, actual or potential. The Legislature has not authorized anything resembling 'price-fixing' in the traditional, horizontal sense: it has authorized no one to fix the price charged by a competitor. Thus the Alcoholic Beverage Control Act does not create the special danger threatened by a statute which delegates *industry-wide* regulatory power to interested members of the regulated industry.

To the extent that the retail price maintenance provisions enable a producer to control the bargaining process between those who sell and those who buy his own product, the Legislature could reasonably assume that competition among producers,[15] coupled with the bargaining power of those low-overhead retailers who desire lower retail prices, would provide a safeguard against excessive prices. In all probability, that safeguard is at least as effective as any which the Legislature could be expected to provide by promulgating explicit standards for the setting of retail prices, enforcible by an administrative or judicial agency.[16] To impose a requirement of expressed legislative standards would here reflect 'little more than a judicial fetish

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15. At the time of the transactions in question, section 24755 of the Business and Professions Code required, and section 24750 permitted, retail price maintenance only as to brands which were "in fair and open competition with alcoholic beverages of the same general class." Although some commentators took the view that this limitation had little practical effect (see, e.g., Herman, *Free and Open Competition* (1957) 9 Stan.L.Rev. 323, 327), the Legislature could reasonably have reached a different conclusion. Moreover, apart from the "fair and open competition" clause, the Legislature, as we said in *Allied Properties* (p. 148), "could reasonably proceed on the theory that the public will be adequately protected against excessive prices by the ordinary play of competition between manufacturers."

16. The extraordinary difficulty of formulating meaningful price guidelines suggests that any legislative effort to do so here might well have proven utterly futile. (See, e.g., Fulda, *Resale Price Maintenance* (1954) 21 U.Chi. L.Rev. 175, 182 fn. 33.)

for legislative language, the recitation of which [would provide] no additional safeguards to persons affected by the exercise of the delegated authority.' (Warren v. Marion County (1960) 222 Ore. 307, 314; see also 1 Davis, Administrative Law Treatise, § 2.15, pp. 148-151 and 1965 Supp., pp. 52-55; Jaffe, *Law Making by Private Groups* (1937) 51 Harv.L.Rev. 201, 248-251.)

In light of these observations, we find transparently erroneous the arguments that the statute unlawfully delegates 'price-fixing' power because (1) the producer *must* set the price which will be observed in resale; (2) the law imposes an obligation upon all people in this state to observe that price; and (3) the violation of the act is a 'public offense.'

All three arguments ignore the basic difference between a statute requiring the unilateral designation by each producer of the resale price of his own product and a statute requiring the multilateral observance by all competitors of a fixed minimum price of a commodity. That the private act of specifying a resale price is lifted by the statute beyond the contracting producer and retailer to a publicly enforced observance by all retailers within the state does not convert the legislation into a 'price-fixing' statute, since the law still empowers no one to regulate the retail price of any commodity.

Although the Alcoholic Beverage Control Act *requires* (Bus. & Prof. Code, § 24755), whereas the Fair Trade Act merely *permits* (Bus. & Prof. Code, §16902), producers and wholesalers to set retail prices, this mandatory aspect of the Alcoholic Beverage Control Act 'does not render the function of a producer or wholesaler legislative in character but, to the contrary, decreases his discretion since he is not free to determine whether fair trading should occur. While mandatory fair trading means that retailers cannot obtain merchandise free from price restrictions, this is due to the determination of the Legislature, not the action

of the producers and wholesalers.' (Allied Properties v. Dept. of Alcoholic Beverage Control, supra, 53 Cal.2d 141, 150.) The mandatory feature of the act endangers none of the interests which the anti-delegation doctrine seeks to protect, since it threatens neither the principle that truly fundamental issues should be resolved by the Legislature nor the precept that a grant of authority should be accompanied by safeguards adequate to prevent its abuse. Thus it provides no reason to hold that the act unconstitutionally delegates legislative power."

III. The 1961 Amendments to the California Alcoholic Beverage Control Act's Mandatory Minimum Retail Price Maintenance System for Liquor Do Not Eliminate the Requirements of Fair and Open Competition and Do Not Conflict with the Federal Anti-Trust Laws

Appellants erroneously contend in their jurisdictional statement that "(w)hen the California Superior Court, For the City and County of San Francisco reversed a license revocation because there had been no finding that the liquor sold had been in free and open competition, the statute was changed so that free and open competition is no longer a requirement." (Appellants' Jurisdictional Statement, p. 17) Hence, argue the appellants, California's mandatory minimum retail price maintenance system for liquor is now in violation of the federal anti-trust laws because the requirement of free and open competition has been eliminated by the 1961 amendment to the California law.

Such a contention rests upon erroneous premises, completely ignores the specific holding of the California Court of Appeal herein with respect to same, and is totally without merit.

Prior to 1961, the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor involved the use of the so-called "fair trade

contract" as the vehicle for filing the minimum resale price with the California Department of Alcoholic Beverage Control. Following attacks by violating licensees on the validity of the "fair trade contracts" on various quasi-contract grounds (i.e. no mutuality of obligation, failure of consideration, non-signer, etc., see *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal. App. 2d 787 (1963), 30 Cal. Rptr. 668) the California Legislature in 1961, while retaining and authorizing "fair trade contracts" under the California Alcoholic Beverage Control Act (§§ 24750-24753, Calif. Bus. & Prof. Code), amended section 24755 of the Alcoholic Beverage Control Act so as to substitute a "minimum retail price schedule" in place of the "fair trade contract" itself as the vehicle to be used in filing the minimum retail prices with the Department of Alcoholic Beverage Control.

The use of the "minimum retail price schedule" as the filing vehicle in California's mandatory minimum retail price maintenance system is adopted from Connecticut's mandatory minimum retail price maintenance system for alcoholic beverages, which, as heretofore noted, has already been the subject of an appeal to this Honorable Court and this Court dismissed the appeal for want of a substantial federal question. (*Schwartz v. Kelly,* 140 Conn. 176, 99 A. 2d 89, 346 U. S. 891)

It may be noted that besides *California* and *Connecticut,* the unilateral filing of a minimum retail price schedule is the vehicle used to establish minimum retail prices in Hawaii (Rev. Laws of Hawaii 1955, Title 21, Ch. 159), *Massachusetts* (Mass. Gen. Laws, Ch. 138, § 25C). *Minnesota* (Laws of 1951, M.S.A. 340.97-340.978), *New Jersey* (Dept. of Law and Public Safety, Div. of A.B.C., State Reg. #30), and *New York* (wine) (N.Y. Consol. Laws, Ch. 3-B, § 101-bbb).

As set forth in the decision of the California Court of Appeal from which the instant appeals are taken, *Reimel v. Alcoholic Beverage Control Appeals Board et al,* 256 Advance Calif. Appellate 188, 64 Calif. Rptr. 26 at 34-35, hearing by California Supreme Court denied:

> "Nor do we deem the absence from section 24755 of the specific requisite that the brands be in 'fair and open competition with alcoholic beverages of the same general class produced by others' to create a constitutional infirmity. Such fair and open competition is a positive requirement of the Cartwright Antitrust Law (Bus. & Prof. Code, §§ 16700-16758). Minimum retail price schedules resulting from any combination for the purpose of stifling fair and open competition would be an offense against that law.
>
> Respondents complain that the Department is no longer required under section 24755 to produce affirmative evidentiary proof, or make express findings, that the brands involved are in such fair and open competition. This contention assumes that there was such a requirement prior to 1961. *DeMartini v. Department of Alcoholic Beverage Control,* 215 Cal.App.2d 787, 808-809, considering the pre-1961 Act, held that certain statutory presumptions constituted evidence, in similiar proceedings before the Department, that the filed price schedules were in fair and open competition. (Citations) *DeMartini v. Department of Alcoholic Beverage Control,* supra, (pp. 813-814), also held that express findings that the products were in fair and open competition were not required."

Notwithstanding the power given to the states under the Twenty-first Amendment with respect to alcoholic beverages destined for use, distribution or consumption within the states' borders (See Argument I, supra), these instant cases do *not* present a conflict between state power under the Twenty-first Amendment and federal power under the

Commerce Clause. The California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor sold at retail in California does *not* sanction horizontal price-fixing conspiracies, combinations, monopolies, unfair trade practices, unfair competition, or any other violation of federal law.

As cogently noted by this Honorable Court[18] in *Seagram v. Hostetter*, 384 U.S. 35 at 45 (1966):

> "The appellants' contention that #9 violates the command of the Supremacy Clause needs no extended discussion. The argument is based upon a claimed inconsistency between #9 and the federal antitrust laws, specifically the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1-7 (1964 ed.), and #2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13 (1964 ed.).
>
> *"In this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decision * * enjoin(s) seeking out conflicts between state and federal regulation where none clearly exists.'* (Citation)" (Emphasis added)

In making their factual assertions and legal contentions concerning an alleged lack of, or non-requirement of, fair and open competition in the sale of liquor in California under California's mandatory minimum retail price control provisions, appellants simply fail to perceive and recognize that under California's past and present minimum resale price control provisions for liquor there is no conflict with the federal anti-trust and unfair practice laws presented.

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18. Nor should it be overlooked that this Honorable Court has consistently upheld state sanctioned minimum resale price maintenance programs even as to ordinary commodities. (*Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U. S. 306 (1964); *Pep Boys v. Pyroil Sales Co.*, 299 U. S. 198 (1936); *Schwegmann Bros. Giant Super Markets v. Hoffman-LaRoche, Inc.*, 221 F. 2d 326 (1955), cert. denied 350 U. S. 839; *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, 205 F. 2d 788 (1953), cert. denied 346 U.S. 856)

The past and present policy of California with respect to the retail sale of liquor under the mandatory minimum retail price control provisions—as said policy is expressed in sections 23001 and 24749 of the California Alcoholic Beverage Control Act—does not sanction or permit, nor do the provisions themselves sanction or permit, in any way, horizontal price-fixing conspiracies or restraints of trade, anti-trust violations, or vertical unfair trade practices. Hence, the federal government, as well as the State, may take action against any such violations, and correct any such abuses.[19]

In actual practice, the federal anti-trust and restraint of trade laws together with California's corresponding companion laws foster and support the orderly functioning of the California Alcoholic Beverage Control Act's mandatory minimum retail price maintenance system for liquor.[20]

It is only against uncontrolled price wars, cut-rate sales and ruinous competition in the retail sale of liquor within its borders that California has resolutely set its statutory face.

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19. Burke v. Ford, 389 U.S. 320 (1967); Melrose Distillers, Inc. v. United States, 258 F.2d 726 (4th Cir. 1958), affirmed 358 U.S. 878; United States v. Maryland State Licensed Bev. Association, 169 F. Supp. 431 (1959); United States v. Maryland State Licensed Beverage Association, 138 F. Supp. 685 (1956); United States v. McKesson & Robbins, 351 U.S. 305 (1955); California Bus. & Prof. Code, §§ 16700 et seq., 17000 et seq., 25503 & 25505; 15 U.S.C.A. § 1 et seq.

20. The California Court of Appeal in DeMartini v. Department of Alcoholic Beverage Control, 215 Cal.App.2d 787, 809-811 (1963) 30 Cal.Rptr. 668, 680-681, hearing by California Supreme Court denied, held that it was a matter of common knowledge in California (to the extent that California courts could take judicial notice thereof) that there are countless retail outlets in California merchandising countless brands of distilled spirits, which countless brands vie with each other for public favor.

CONCLUSION

It is respectfully submitted that the appeal should be dismissed for want of a substantial federal question.

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(Appendices Follow)

Appendix A

CHAPTER 10. ALCOHOLIC BEVERAGES FAIR TRADE CONTRACTS AND PRICE POSTING

§ 24749. Policy.
§ 24750. Contracts lawful.
§ 24750.5. Wine fair trade contracts.
§ 24751. Closeouts.
§ 24752. Selling below fair trade price.
§ 24753. Contrasts between producers.
§ 24754. Containers.
§ 24755. Price schedule; "Loss leader."
§ 24755.1. Penalties.
§ 24756. Distilled spirits price posting.
§ 24757. Rules.

24749. Policy. It is the declared policy of the State that it is necessary to regulate and control the manufacture, sale, and distribution of alcoholic beverages within this State for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate price wars which unduly stimulate the sale and consumption of alcoholic beverages and disrupt the orderly sale and distribution thereof, it is hereby declared as the policy of this State that the sale of alcoholic beverages should be subjected to certain restrictions and regulations. The necessity for the enactment of provisions of this chapter is, therefore, declared as a matter of legislative determination.

24750. Contracts lawful. No contract relating to the sale or resale of any alcoholic beverage which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or owner of the alcoholic beverage and which is in fair and open competition with alcoholic

beverages of the same general class produced by others violates any law of this State by reason of either of the following provisions which may be contained in such contract:

(a) That the buyer will not resell the alcoholic beverage except at the price stipulated by the vendor.

(b) That the producer or vendee of the alcoholic beverage require, upon the sale of the alcoholic beverage to another, that the purchaser agree that he will not, in turn, resell except at the price stipulated by the producer or vendee.

24750.5. Wine fair trade contracts. Fair trade contracts for wine have been and shall continue to be authorized by this chapter. Such contracts shall be governed by the applicable provisions of this chapter and Chapter 11 (commencing with Section 24850).

24751. Closeouts. The provisions authorized by Section 24750 in any contract imply conditions that the alcoholic beverage may be resold without reference to the agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivery of any such alcoholic beverage. At the place of any such sale and upon the goods sold and in any advertisement in connection therewith public notice shall be given of the character of the sale as a closeout sale. The alcoholic beverage shall first be offered to the manufacturer or vendor thereof at the original invoice price at least 10 days before it is offered for sale to the public.

(b) When the alcoholic beverage or container is damaged or deteriorated in quality, and notice of this fact is given to the public at the place of any such sale and upon the goods sold and in any advertisement in connection therewith.

(c) By any officer acting under the orders of any court.

24752. Selling below fair trade price. Willfully and knowingly advertising, offering for sale, or selling any alcoholic beverage at less than the price stipulated in any contract entered into pursuant to this chapter, or in any effective minimum retail price scheduled filed with the department pursuant to Section 24755, whether the person so advertising, offering for sale, or selling is or is not a party to the contract, is unfair competition and is actionable at the suit of any person damaged thereby.

24753. Contracts between producers. This chapter does not apply to any contract or agreement between producers or between wholesalers or between retailers as to sale or resale prices.

24754. Containers. The provisions of this chapter apply to the containers, cartons, cases, or bottles for alcoholic beverages.

24755. Minimum retail price schedule; filing; amendments; loss leader sales; rejection of noncomplying schedules; exempt sales. (a) No package of distilled spirits which bears the brand, trademark or name of the owner or person in control shall be sold at retail in this State for consumption off the license premises unless a minimum retail price for such package first shall have been filed with the department in accordance with the provisions of this section.

(b) A price for each of such packages shall be in a minimum retail price schedule setting forth with respect to each package the exact brand, trademark or name, capacity, and type of package, type of distilled spirits, age and proof, where stated on the label, and the minimum selling price at retail. The price for any such package may be filed separately and differently for the trading area of Southern California and the trading area of Northern California. The trading area of Southern California shall

consist of the Counties of Santa Barbara, Ventura, Los Angeles, Orange, Riverside, San Bernardino, Imperial and San Diego. The Northern California trading area shall consist of the other counties of the State. No more than one person shall file a schedule for the same package for the same trading area. Any person filing such schedule shall cause such schedule to be published in a manner which will result in each retailer affected by such schedule being advised of the contents of such schedule prior to the effective date thereof.

(c) Such schedule shall be filed by (1) the owner of the brand, if licensed in the State; (2) any licensee, other than a retailer, selling the brand and who is authorized in writing by the brand owner to file such schedule if the brand owner is not licensed in this State; (3) a manufacturer or rectifier licensed in this State and who bottles under the brand owned by a retailer; or (4) any licensee with the approval of the department, if the owner of the brand does not file or is unable to file a schedule or authorize a licensee other than a retailer to file such schedule.

(d) Schedules filed pursuant to this section may be amended, changed, or modified by filing such amendments, change, or modification with the department on or before the 15th day of any month to take effect on the first day of the second succeeding calendar month; except that prices filed for a brand, size, or type not included in a schedule in effect at the time such brand, size, or type is filed, and prices filed to meet the price of a competitive brand, may be filed on or before the 15th day of any month to take effect on the first day of the following month. For the purpose of this section, a competitive brand shall mean any brand of the same type of distilled spirits having a filed selling price at retail within one dollar ($1) per gallon of the brand for which a competitive price is filed.

No retailer shall sell any package of distilled spirits as a loss leader. "Loss Leader," as used in this section, means a sale below cost as such cost is defined in Sections 17026 to 17029, inclusive, of this code, except that a sale below cost made under the provisions of Section 17050 of this code shall not be deemed a loss leader sale.

The department shall reject any price schedule which does not comply with this subdivision.

(e) No offsale licensee shall sell any package of distilled spirits at any price less than the effective filed price of such package unless written permission is granted by the department, for good cause shown and for reasons not inconsistent with this division.

(f) The provisions of this section shall not apply to:

(1) A closeout sale made in good faith and approved by the department when the following conditions exist: (i) the stock of distilled spirits sought to be closed out has been in this State, either in the possession of the vendor who sold it to the retailer or in the possession of the retailer who seeks to close out the brand, for a period of not less than six months; (ii) the stock of distilled spirits to be closed out was not brought into this State for the purpose of offering it, or any part of it, at a closeout sale; (iii) at least 10 days prior to filing a request with the department for approval to sell the stock at a closeout sale, the retailer had offered to return the distilled spirits, at his original invoice cost, to both the vendors from whom he purchased them or to his successor and to the licensee who filed the minimum price schedule under the provisions of this section; (iv) such offer of return was not accepted.

At the place of any closeout sale and upon any package of distilled spirits to be so sold and in any advertisement in connection therewith, public notice shall be given of the sale as a closeout sale. Following the conclusion of a close-

out sale, the retailer who conducted such sale shall not sell the same brands of distilled spirits for a period of at least one year.

(2) Sales made with the approval of the department when the distilled spirits or the package is damaged or deteriorated in quality and notice of this fact is given to the public at the place of any such sale and upon the package offered for sale and in any advertisement in connection therewith.

(3) Sales made by any officer acting under the orders of any court.

(g) A minimum retail price schedule containing a minimum retail price for each package of any brand of beer may be filed under the provisions of this chapter by the person in control of such brand and when so filed, the provisions of this chapter and any rules adopted by the department for the administration of the provisions of this chapter shall apply to the sale of packages of such brand of beer. (Added Stats. 1961, c. 635, p. 1835, § 4.)

24755.1 Penalties. No criminal penalties shall be imposed on any licensee for a violation of the provisions of Section 24755 nor shall the license of a licensee be suspended or revoked for a violation of such section.

The penalties imposed by the department for violations of such section shall be confined solely to monetary penalties for each violation committed during 36 consecutive months and shall be in the following amounts:

For the first violation, two hundred fifty dollars ($250); for the second and subsequent violations, one thousand dollars ($1,000). The penalties herein provided shall be due and payable by the licensee to the General Fund not later than 30 days from the date the department rendered its decision imposing the penalty. Should the licensee appeal the decision of the department, he shall either pay the

amount of the penalty under protest or execute a surety bond in the amount of the penalty. The surety bond shall be executed by the licensee as principal and a corporation such as is mentioned in Section 1056 of the Code of Civil Procedure in this state as surety, payable to the General Fund at such time as the final decision is rendered affirming the department's decision. If the final decision should reverse the decision of the department, the penalty paid by the licensee under protest shall be returned to him with interest at the rate of 6 per cent per annum or the surety bond executed by the licensee terminated. The license of a licensee against whom the department has imposed the monetary penalty and who has refused to pay the penalty for each violation under protest or execute a surety bond as herein provided shall be automatically suspended and shall remain suspended until such time as the licensee either pays the penalty under protest or executes the surety bond as herein provided.

Each sale in violation of section 24755 shall constitute a separate violation.

24756. *Distilled spirits price posting.* Every distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall file and maintain with the department a price list showing the prices at which distilled spirits are sold to retailers by the licensee. Sales of distilled spirits to retailers by each distilled spirits manufacturer, brandy manufacturer, rectifier, and wholesaler shall be made in compliance with the price list of the licensee on file with the department.

24757. *Rules.* The department may adopt such rules as it determines to be necessary for the administration of Sections 24754 to 24756, inclusive, and shall take such steps as may be necessary to enforce the provisions of such sections and the rules adopted by it for the administration thereof.

Appendix B

99. Minimum Retail Price Schedules. (a) Posting of Minimum Retail Price Required. No off-sale licensee shall sell any package of distilled spirits at a price less than the effective minimum retail price of such package filed with the department, unless written permission is granted by the department for good cause shown and for reasons not inconsistent with the law.

The licensed owner or person in control of a brand, trade mark or name appearing on a package of distilled spirits which is to be sold for consumption off the licensed premises in California must file a "Distilled Spirits Minimum Retail Price Schedule" containing the minimum bottle and case prices to consumers for every distilled spirits item carrying that brand, trade mark or name.

(b) Brand Defined. The word "brand" as used herein means "brand, trade mark, label or name", and if an additional secondary name or a different form of label is used, each will be considered to be a separate brand.

(c) Distilled Spirits Item Defined. "Distilled spirits item" as used herein means a distilled spirits package that differs from all other distilled spirits in addition to its brand, as defined in (b) above, in any one of the following categories: (1) Type of distilled spirits including type of bottling (in bond or not in bond), and type of blend (blend of straight whiskeys or spirits blend); (2) Percentage of Straight Whiskey; (3) Age, if shown on the label; (4) Proof; (5) Origin (domestic or imported); (6) Bottle size; and (7) Number of bottles in a case.

When a container other than the normal container for a brand is used as in the case of a decanter, higher minimum retail prices must be established to reflect any additional cost involved.

(d) Distilled Spirits Sold "On-Sale" Only. If a particular item is labeled to indicate that it is intended for sale to and for dispensing by on-sale retailers only (such as "bar package", "for on-sale only"), the minimum retail price thereof need not be filed. However, if any sale for off-sale consumption of such item should be made, the licensee making such sale will have violated the law.

(e) Who Files Minimum Retail Price Schedules. Only one licensee is permitted to file a "minimum retail price schedule" containing the price for the same item for the same trading area. However, different prices may be filed in the Northern and Southern trading areas.

This means that (1) the owner of the brand or the corporate subsidiary who exclusively markets the products thereof and so is the controller of the brand, if licensed in California, if other than a retailer, must file; or (2) if the owner of the brand is not licensed in California and has no corporate subsidiary marketing in California, any licensee, other than a retailer, authorized by him in writing must file, such as a wholesale or importer authorized by an out-of-State or out-of-country brand owner; or (3) if the brand is owned by a retailer, the California-licensed manufacturer or rectifier who bottles an item of distilled spirits under that brand must file for the item; or (4) if none of the three situations above apply and the brand is owned by a retailer, the importing wholesaler must file. If none of the three situations above apply and the brand is not owned by a retailer, then any licensee, other than a retailer, who secures the approval of the department must file.

(f) Price Schedule Sheets to be Filed. Four copies of a "Distilled Spirits Minimum Retail Price Schedule" on a form prescribed by the department must be filed with the department, 1215 O Street, P.O. Box 1139, Sacramento 5, and one copy retained by the licensee in his office for inspec-

tion. The "Minimum Retail Price Schedule" may be printed, typewritten or otherwise duplicated on 16 or 20 pound paper on a format and size prescribed by the department and must show the form number "ABC 705" in the lower lefthand corner of the face of the sheet. All information called for on the form sheet must be supplied. A separate set of "Price Schedules" must be made originally, or if added later as a new item, for every different type of distilled spirits, and if that type has different categories as defined in (2), (3), (4) and (5) in the definition of "Distilled Spirits Item" in (c) above, a separate set must be made for each such difference. Each schedule must contain every bottle size (6) and every size of case (7) in which that brand, type, etc., will be sold. When a new bottle size or new size case is to be sold, or the price of any size of bottle or size of case already on file is to be changed either independently or to meet the price of a competitive brand, new sets of price schedules, in quadruplicate, must be filed to replace those on file and must also include all the information that was on the superseded schedule. Both minimum retail bottle price and minimum retail case prices covering all case sizes must be shown on the price schedules for each size and type.

(g) Filing Dates; New Item. A set of original schedules for new items must be filed on or before the close of business of the fifteenth day of any calendar month to take effect on the first day of the following month, provided, however, the price of such new item is published on or before the aforesaid effective date.

(h) Change of Minimum Retail Price on File. A set of replacement schedules must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the second succeeding month; provided, however, the changed price is published on or before the aforesaid effective date.

(i) Change in Price of an Item to Meet Price of Competitive Brand. A set of replacement schedules for competitive items must be filed on or before the close of business of the fifteenth day of any calendar month, to be effective on the first day of the following month; provided, however, such price change is published on or before the aforesaid effective date.

A competitive brand is a brand of the same type of distilled spirits as the brand for which a change in price is being filed and for which at the time of filing there is on file a "Price Schedule" sheet filed by some other licensee showing a minimum retail price for the competitive brand item within one dollar per gallon of the price being charged, and proportionately for smaller sizes. The same type of distilled spirits means one identical as to categories (1) and (5) in the definition of "Distilled Spirits Item" in (c) above; the price change involved must apply to the identical item indicated in categories (6) and (7).

If a price is filed to meet the price of a competitive brand, the price so filed shall be the same as the price which is being met.

(j) Filing Date Exception. Whenever the fifteenth day of any month falls on Saturday, Sunday or a legal holiday, the price schedules required to be filed may be filed not later than the close of business the next business day.

(k) Publication. The person filing minimum retail price schedules shall cause prices for all items on every original price schedule and of every change of price or new price on every replacement price schedule to be published in a trade journal of general circulation in the trading areas affected on or before the effective date thereof. Publication of minimum retail prices for a brand sold only to a single retailer may be accomplished by the mailing of such price schedules by the importer, manufacturer, manufacturer's agent, recti-

fier or wholesaler, and any amendments thereto, to the retail licensee affected thereby. The schedule shall be deposited in the United States Post Office on or before the date or dates required for publication of price schedules as prescribed above in this paragraph, and the mailing shall be complete at the time of such deposit. A record of each such notification should be retained in the file of the posting licensee for three years.

(l) Deliveries. No manufacturer, wholesaler or rectifier shall make deliveries of any particular item of distilled spirits to any off-sale retail licensee before a "Price Schedule" with that item thereon has been filed with the department; thereafter he may make deliveries thereof within such time before the price becomes effective as would give the retailer reasonable time to get the item ready for sale upon the price becoming effective.

(m) Withdrawal of Item from Price Schedule. No item may be deleted from a replacement "Price Schedule" once it has been filed on an original schedule until the department authorizes such deletion when the department makes a finding that the item is carried in wholesale and off-sale retail inventories in only very small quantities.

(n) Transfer of Price Filing Obligation. When for any reason, price filing responsibility for any item is transferred from one licensee to another, the price schedules of the licensee then on file will continue in effect until replaced by an effective new filing by the successor which will be considered to be a schedule already on file.

(o) Tax Increase or Government Order. Pursuant to an order issued by the department, any price schedule may be changed at any time to reflect changes in federal or state excise taxes on distilled spirits or to comply with the requirements of any order issued by the federal government and relating to price control.

(p) Sales as Loss Leaders Prohibited. All distilled spirits minimum retail prices filed under the provisions of Section 24755 shall comply with all the provisions of said section including the provisions of subsection (d) which prohibits the sale of distilled spirits as a loss leader. Any licensee filing distilled spirits minimum retail prices below the purchasing retailer's cost of acquisition plus said retailer's cost of doing business as referred to in said subsection shall produce evidence to show that such price was filed to meet the legal price of a competitor selling the same article or product.

NOTE: Authority cited for amendment filed 10-2-56: Sections 24757 and 25750, Business and Professions Code; Section 22, Article XX, California Constitution. Issuing agency: Department of Alcoholic Beverage Control. Additional authority cited: Sections 24749, 24750, 24751, 24752, 24755 and 25752, Business and Professions Code.

History: 1. Repealer and new section filed 9-12-61; designated effective 10-15-61 (Register 61, No. 18). For prior history, see Register 60, No. 16.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

COHON ET AL. *v.* KIRBY, DIRECTOR, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF CALIFORNIA.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT.

No. 57. Decided October 14, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.